Orland Park Motor Cars, Inc., d/b/a Mercedes Benz of Orland Park *and* International Brotherhood of Teamsters, Local No. 731, AFL–CIO. Cases 13–CA–38061 and 13–CA–38185

April 20, 2001

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS LIEBMAN AND HURTGEN

On May 12, 2000 Administrative Law Judge William J. Pannier III issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel and the Charging Party filed answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,[1] findings,[2] and conclusions and to adopt the recommended Order as modified and set forth in full below.[3]

The judge found, inter alia, that a *Gissel*[4] bargaining order is necessary to remedy the Respondent's unfair labor practices. We agree. In *Gissel*, the Supreme Court "identified two types of employer misconduct that may warrant the imposition of a bargaining order: 'outrageous and pervasive unfair labor practices' ('category I') and 'less extraordinary cases marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election processes' ('category II')."[5] The Court found that, in determining a remedy in category II cases, the Board can take into consideration the extensiveness of an employer's unfair labor practices in determining whether the "possibility of erasing the effects of past practices and ensuring a fair election . . . by the use of traditional remedies, though present, is slight and employee sentiments once expressed by authorization cards would, on balance, be better protected by a bargaining order."[6]

In agreeing with the judge that a *Gissel* bargaining order should be issued, we find, for the reasons set forth below as well as by those set forth by the judge, that the Respondent's course of misconduct clearly demonstrates that the holding of a fair election in the future would be unlikely and that the "employees wishes are better gauged by an old card majority than by a[n] election."[7]

We find this case falls within category II, and thus we have, as mandated by the Supreme Court in *Gissel*, examined the extensiveness of the Respondent's unfair labor practices and the likelihood that the coercive effects of these past practices would be erased by the use of traditional remedies. In this regard, we observe that the Respondent's unfair labor practices include "hallmark" violations such as threatening to discharge employees who started the Union's organizing campaign and subsequently discharging employee Michael Chiarito, the leading union advocate among the Respondent's employees. Similarly, the Respondent discharged employee Brad Patrylak for returning to the employees' strike against the Respondent after previously deciding to cross the picket line. The Respondent also committed other serious and pervasive unfair labor practices. It announced that its consideration of improvements to the employees' benefits plan had ceased because of the Union's organizing campaign, it threatened employees that

[1] We find no merit to the Respondent's contention that the judge committed reversible error by receiving into the record certain position statements which the Respondent disavowed 4 days before the start of the hearing. Because the judge's findings do not rely on the contents of the position statements, but rather are clearly based on the testimony and other documentary evidence presented at trial, there has been no showing that the Respondent was prejudiced by the judge's ruling on the position statements.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products,* 91 NLRB (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] We shall modify the judge's recommended Order to conform it to our usual format and to include our usual language.

[4] *NLRB v. Gissel Packing Co*., 395 U.S. 575 (1969).

[5] *Charlotte Amphitheater Corp. v. NLRB*, 82 F.3d 1074, 1077 (D.C. Cir. 1996) (quoting *Gissel*, 395 U.S. at 613–614).

[6] *Gissel*, supra at 613, 614–615; *Cassis Management Corp*., 323 NLRB 456, 459 (1997), enfd. 152 F.3d 917 (2d Cir. 1998), cert. denied 525 U.S. 983 (1998).

[7] *Charlotte Amphitheater Corp. v. NLRB*, supra, 82 F.3d at 1078.

We adopt the judge's finding that the Union had obtained valid authorization cards from a majority of unit employees when it requested recognition from the Respondent on August 30, 1999. With respect to the judge's finding that the card bearing the signature of Christopher Allen Shelton is valid, we adopt that finding based on the credited testimony of Michael Chiarito, who testified that he observed Shelton filling out the card and signing it. It is well established that the solicitor of a union authorization card can authenticate the card even if the card signer does not testify. See, e.g., *Airtex*, 308 NLRB 1135, 1139 (1992). Because no exception was taken to the judge's refusal to draw an adverse inference from the fact that Shelton did not testify, that issue is not before us. The controlling standard for determining whether to draw an adverse inference from a party's failure to call a witness is stated in *International Automated Machines*, 285 NLRB 1122, 1123 (1987), enfd. mem. 861 F.2d 720 (6th Cir. 1988).

We also adopt the judge's finding that the Respondent violated Sec. 8(a)(5) and (1) of the Act, as alleged, by refusing to recognize and bargain with the Union. Because the Respondent embarked on its course of unlawful conduct before the Union demanded recognition on August 30, 1999, the day the Union first had authorization cards from a majority of the unit employees, we find that the Respondent's obligation to recognize and bargain with the Union began on August 30. See *Trading Port, Inc.*, 219 NLRB 298, 301 (1975).

they would be discharged for engaging in a strike,[8] it surveilled employees' strike activities,[9] and it refused to allow unfair labor practice strikers to return to work upon their unconditional offers to return to work.[10]

The coercive effect of the Respondent's misconduct cannot be denied. These serious violations began within days of the Union's distribution of authorization cards to employees when, upon learning of the employees' union activity, Service Manager Mike Maus asked employees who started the union activity and told them that when he found out he would fire the person. Only several days later, upon learning that the Union filed a representation petition, the Respondent's Vice President and General Manager Barry Taylor met with employees to tell them that in light of the union activity the Respondent had ceased the process of improving benefits for employees. Further, the Respondent continued its course of unlawful conduct in the following days with surveillance of the employees' strike activity, threats to discharge strikers, and the subsequent discharge of two employees for their union activity (including the leading union advocate) along with the refusal to reinstate the unfair labor practice strikers upon their unconditional offers to return. This conduct "goes to the very heart of the Act" and is not likely to be forgotten.[11] Such action can only serve to communicate in the clearest terms that the Respondent was "willing to go to extraordinary lengths in order to extinguish the union organization effort" and that employees could very well lose their employment if they persist in engaging in union activity.[12]

The severity of the Respondent's unlawful conduct is exacerbated by the involvement of high-ranking officials.[13] As noted above, upon learning that the petition had been filed, Vice President and General Manager Taylor swiftly moved to inform employees of the cancellation of any contemplated improvements in their benefits and specifically linked this action to the employees' union activity. Indeed, "[w]hen the antiunion message is so clearly communicated by the words and deeds of the highest levels of management, it is highly coercive and unlikely to be forgotten."[14]

Additionally, although the discharged employees and the unreinstated strikers are entitled to reinstatement and backpay, these remedies would not, in our view, erase the coercive effects of the Respondent's conduct. The unlawful discharges and the refusals to reinstate the unfair labor practice strikers came on the heels of the repeated threats to discharge union activists and the strikers, with such threats beginning promptly after the Respondent learned of the employees' organizing activity. Given the severity and the swiftness of this conduct, "[t]he reinstated employees would not likely risk again incurring the Respondent's wrath and another period of unemployment by resuming their union activities."[15]

We further note that there is no claim here that a *Gissel* order is not warranted because of the passage of time between the *Gissel* order and the unfair labor practices that warranted it, or because of an intervening turnover of employees and management. Indeed, at the time the judge issued his decision, Taylor (the Respondent's highest ranking official), Nocera, and Maus, who together committed many of the unfair labor practices found here, were still employed in the same management positions they occupied during august and September 1999. There has been a relatively short time period between the date of the unfair labor practices and the issuance of the instant Order, and the Respondent has not argued that changed circumstances preclude the issuance of a bargaining order. Accordingly, these issues, which have concerned some courts in denying enforcement of our *Gissel* orders, are not present in this case.[16]

In concluding that a *Gissel* order is warranted here, we have examined the appropriateness of this remedy under the circumstances existing at the present time and we

[8] In adopting the judge's finding that the Respondent's Finance and Insurance Manager Todd Koleno was an agent of the Respondent when he threatened striking employees with discharge, we find it unnecessary to rely on Koleno's attendance at certain management meetings, in the absence of evidence of employees' knowledge that he attended those meetings. Rather, we find that in view of Koleno's position as manager, Koleno's presence on the picket line with General Sales Manager David Nocero—an undisputed supervisor and agent of the Respondent—at the time Koleno made his comments, and the fact that Koleno's threats were consistent with other threats made by the Respondent both before and after this incident, employees could reasonably believe that Koleno had been speaking for the Respondent when he threatened the strikers with discharge. See generally *B-P Custom Building Products,* 251 NLRB 1337, 1338 (1980).

[9] In adopting the judge's finding that the Respondent violated Sec. 8(a)(1) of the Act by engaging in surveillance of the employees' strike activities, we rely on the fact that the Respondent began taking pictures of the employees' strike activity beginning on the first day of the strike. At that time, none of the strikers had engaged in any misconduct that might arguably have justified the Respondent's surveillance. We find it unnecessary to pass on whether the subsequent photographing and videotaping that continued throughout the duration of the strike was unlawful because any such finding would be cumulative and would not affect the remedy.

[10] In adopting the judge's finding that the Respondent's employees were engaged in an unfair labor practice strike on September 1 or 2, 1999, we find it unnecessary to pass on whether the strike was an unfair labor practice strike at its inception on August 30, 1999.

[11] *NLRB v. Entwistle Mfg. Co.*, 120 F.2d 532, 536 (4th Cir. 1941).

[12] *Consec Security,* 325 NLRB 453 (1998), enfd. 185 F.3d 862 (3d Cir. 1999).

[13] See *M. J. Metal Products*, 328 NLRB 1184, 1185 (1999).

[14] *Consec Security*, 325 NLRB at 455.

[15] *M. J. Metal Products*, supra.

[16] Id. at 1185 fn. 11, and cases cited therein.

have considered the inadequacy of other remedies. See, e.g., *Flamingo Hilton-Laughlin v. NLRB*, 148 F.3d 1166 (D.C. Cir. 1998). We have also given due consideration to employees' Section 7 rights. In *Gissel*, the Supreme Court rejected the argument that a bargaining order is a punitive remedy that "needlessly prejudices employees' Section 7 rights." 395 U.S. at 612. The Court reasoned as follows:

> If an employer has succeeded in undermining a union's strength and destroying the laboratory conditions necessary for a fair election, he may see no need to violate a cease-and-desist order by further unlawful activity. The damage will have been done, and perhaps the only fair way to effectuate employee rights is to reestablish the conditions as they existed before the employer's unlawful campaign.[33] There is, after all, nothing permanent in a bargaining order, and if, after the effects of the employer's acts have worn off, the employees clearly desire to disavow the union, they can do so by filing a representation petition. For, as we have pointed out long ago, in finding that a bargaining order involved no "injustice to employees who may wish to substitute for the particular union some other . . . arrangement," a bargaining relationship "once rightfully established must be permitted to exist and function for a reasonable period in which it can be given a fair chance to succeed," after which the "Board may . . . upon a proper showing, take steps in recognition of changed situations which might make appropriate changed bargaining relationships." [395 U.S. at 612–613 (quoting *Franks Bros. Co. v. NLRB*, 321 U.S. 702, 705–706 (1944).]

[33] It has been pointed out that employee rights are affected whether or not a bargaining order is entered, for those who desire representation may not be protected by an inadequate rerun election, and those who oppose collective bargaining may be prejudiced by a bargaining order if in fact the union would have lost an election absent employer coercion. [citation omitted.] Any effect will be minimal at best, however, for there "is every reason for the union to negotiate a contract that will satisfy the majority, for the union will surely realize that it must win the support of the employees, in the face of a hostile employer, in order to survive the threat of a decertification election after a year has passed." Bok, *The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act*, 78 Harv.L.Rev. 38, 135 (1964).

This passage clearly shows that in approving the Board's use of the bargaining order remedy in category II cases, the *Gissel* court explicitly took into account the rights of employees who both favored and opposed union representation. The Court stated that if an employer's unfair labor practices have the tendency to undermine a union's majority strength and destroy election conditions, then "the only fair way to effectuate employee rights" is to issue a bargaining order.[17] In these circumstances, the interests of the employees favoring unionization are safeguarded by the bargaining order. The interests of those opposing the union are adequately safeguarded by their right to file a decertification petition pursuant to Section 9(c)(1) of the Act. On the other hand, if the facts of a case fall within category III, i.e., the employer committed only "minor or less extensive unfair labor practices" with only a "minimal impact on the election machinery," then a bargaining order may not issue, notwithstanding the fact that a majority of employees signed authorization cards in support of the union. 395 U.S. at 615. In sum, the *Gissel* opinion itself reflects a careful balancing of the employees' Section 7 rights "to bargain collectively" and to refrain from" such activity.

Accordingly, for all these reasons, we agree with the judge that a *Gissel* bargaining order is an appropriate and necessary remedy in this case.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Orland Park Motor Cars, Inc., d/b/a Mercedes Benz of Orland Park, Orland Park, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating employees about their own and other employees' union activities.

(b) Threatening to discharge employees who start a union organizing campaign.

(c) Telling employees they will be discharged because they have gone on strike.

(d) Telling employees they have been discharged because they have gone on strike.

(e) Telling employees that consideration of benefit improvements has ceased because a union has begun an organizing campaign.

(f) Engaging in surveillance of employees' strike activities.

(g) Discharging or otherwise discriminating against Brad Patrylak, Michael Chiarito, or any other employee for engaging in union activity or other concerted activity protected by the Act.

(h) Refusing to recognize and bargain with International Brotherhood of Teamsters, Local No. 731, AFL–

[17] Fifteen years earlier, the Court observed in *Brooks v. NLRB*, 348 U.S. 96, 103 (1954), that the Act placed a "nonconsenting minority under the bargaining responsibility of an agency selected by a majority of workers." Thus, the statute itself subordinates the rights of the minority to those of the majority. See Sec. 9(a) of the Act.

CIO as the exclusive collective-bargaining representative of all employees in an appropriate bargaining unit of

> All full-time and regular part-time porters, detailers, hikers, parts department employees and drivers employed by Orland Park Motor Cars, Inc., d/b/a Mercedes Benz of Orland Park at its facility currently located at 8430 West 159th Street, Orland Park, Illinois; excluding all sales persons, mechanics, technicians, office clerical employees, service writers, dispatchers, professional employees, guards and supervisors as defined in the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Recognize and bargain collectively with the Union as the exclusive representative of all employees in the above unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

(b) Within 14 days from the date of this Order, offer full reinstatement to all employees who made unconditional offers to return to work on September 29, 1999, replacing, if necessary, any employees who occupy positions to which they are entitled to return and, if any of those positions no longer exist, to substantially equivalent position or positions, without prejudice to seniority or any other rights and privileges which would be enjoyed had they not been unlawfully denied opportunity to return to work on and after September 30, 1999.

(c) Within 14 days from the date of this Order offer Brad Patrylak full reinstatement to the position of detailer from which he was discharged on September 3, 1999, and offer Michael Chiarito full reinstatement to the position of porter from which he was discharged on September 30, 1999, replacing, if necessary, anyone hired or assigned to either of those positions and, if either or both of those positions no longer exist, to a substantially equivalent position or positions, without prejudice to seniority or any other rights and privileges which would be enjoyed had those unlawful discharges not been made.

(d) Make whole all strikers who unconditionally applied to return to work on September 29, 1999, and Brad Patrylak and Michael Chiarito, for any loss of earnings or other benefits suffered as a result of discrimination against them in the manner set forth in the remedy section of the judge's decision.

(e) Preserve and, within 14 days of a request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of the records if stored in electronic form, necessary to analyze the amounts of backpay due under the terms of this Order.

(f) Within 14 days from the date of this Order, remove from its files any reference to the discharges of Brad Patrylak on September 3, 1999, and of Michael Chiarito on September 30, 1999, and any reference to the refusal to allow strikers to return to work following their unconditional offers to return of September 29, 1999, and within 3 days thereafter notify Patrylak, Chiarito and each of those strikers in writing that this has been done and that the discharges and refusals to allow strikers to immediately return to work will not be used against any of them in any way.

(g) Within 14 days after service by the Region, post at its Orland Park, Illinois office and place of business copies of the attached notice marked "Appendix."[18] Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by its duly authorized representative, shall be posted by Orland Park Motor Cars, Inc., d/b/a Mercedes Benz of Orland Park and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by it to ensure that notices are not altered, defaced or covered by any other material. In the event that, during the pendency of these proceedings, Orland Park Motor Cars, Inc., d/b/a Mercedes Benz of Orland Park has gone out of business or closed its Orland Park office and place of business involved in these proceedings, it shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by it at the closed office and place of business at any time since March 7, 1999.

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that it has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

[18] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Section 7 of the Act gives employees these rights.

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own choice
> To act together for other mutual aid or protection
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT interrogate our employees about their own and other employees' union activities.

WE WILL NOT threaten to discharge our employees who start a union organizing campaign.

WE WILL NOT tell our employees that they will be discharged because they have gone on strike.

WE WILL NOT tell our employees that they have been discharged because they have gone on strike.

WE WILL NOT tell our employees that consideration of benefits improvements has ceased because a union has begun an organizing campaign.

WE WILL NOT engage in surveillance of our employees' strike activities.

WE WILL NOT discharge or otherwise discriminate against Brad Patrylak, Michael Chiarito, or any other employees for or any other employee for engaging in union activity or other concerted activity protected by the Act.

WE WILL NOT refuse to immediately allow unfair labor practice strikers, or any strikers who have not been permanently replaced, to return to their jobs following those strikers' unconditional offers to return to work.

WE WILL NOT refuse to recognize and bargain with International Brotherhood of Teamsters, Local No. 731, AFL–CIO as the exclusive representative of all our employees in the following appropriate unit:

> All full-time and regular part-time porters, detailers, hikers, parts department employees and drivers employed by Orland Park Motor Cars, Inc., d/b/a Mercedes Benz of Orland Park at its facility currently located at 8430 West 159th Street, Orland Park, Illinois; excluding all sales persons, mechanics, technicians, office clerical employees, service writers, dispatchers, professional employees, guards and supervisors as defined in the National Labor Relations Act.

WE WILL NOT in any like or related manner, interfere with, restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL recognize and bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for employees in the bargaining unit set forth above.

WE WILL, within 14 days from the date of this Order, offer full reinstatement to all employees who made unconditional offers to return to work on September 29, 1999, replacing, if necessary, any employees who occupy positions to which they are entitled to return and, if any of those positions no longer exist, to substantially equivalent position or positions, without prejudice to seniority or any other rights and privileges which would be enjoyed had they not been unlawfully denied opportunity to return to work on and after September 30, 1999.

WE WILL, within 14 days from the date of the Order, offer Brad Patrylak full reinstatement to the position of detailer from which he was discharged on September 3, 1999, and offer Michael Chiarito full reinstatement to the position of porter from which he was discharged on September 30, 1999, replacing, if necessary, anyone hired or assigned to either of those positions and, if either or both of those positions no longer exist, to a substantially equivalent position or positions, without prejudice to seniority or any other rights and privileges which would be enjoyed had those unlawful discharges not been made.

WE WILL make whole all strikers who unconditionally applied to return to work on September 29, 1999, and Brad Patrylak and Michael Chiarito, for any loss of earnings and other benefits resulting from our discrimination against them, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Order, remove from our files any reference to the unlawful discharges of Brad Patrylak and Michael Chiarito, and any reference to the refusal to allow strikers to return to work following their unconditional offers to return of September 29, 1999, and within 3 days thereafter notify each of them in writing that this has been done and that the discharges and refusal to allow strikers to immediately return to work will not be used against any of them in any way.

ORLAND PARK MOTOR CARS, INC., d/b/a MERCEDES BENZ OF ORLAND PARK

Richard Kelliher-Paz and *Jason Bowler,* for the General Counsel.

James F. Hendricks Jr. and *Kevin V. Dunphy, Esqs. (Fisher & Phillips LLP),* of Chicago, Illinois, for the Respondent.

Robert E. Bloch, of Chicago, Illinois, for the Union.

DECISION

STATEMENT OF THE CASE

WILLIAM J. PANNIER III, Administrative Law Judge. I heard this case in Chicago, Illinois, on January 3 through 7, 2000. On November 9, 1999,[1] the Regional Director for Region 13 of the National Labor Relations Board (the Board) issued a complaint and notice of hearing in Case 13–CA–38061, based on an unfair labor practice charge filed on September 7, and amended on September 9 and, again, on October 7, alleging violations of Section 8(a)(1), (3),

[1] Unless stated otherwise, all dates occurred during 1999.

and (5) of the National Labor Relations Act (the Act). On December 15 the Regional Director issued a complaint and notice of hearing in Case 13–CA–38185, based on an unfair labor practice charge filed on November 1, alleging violation of Section 8(a)(1) and (3) of the Act. By order consolidating cases issued on December 15 the Regional Director consolidated those cases for hearing and decision.

All parties have been afforded full opportunity to appear, to introduce evidence, to examine and cross-examine witnesses, and to file briefs. Based on the entire record,2 on the briefs which were filed, and upon my observation of the demeanor or the witnesses, I make the following

FINDINGS OF FACT

I. THE ALLEGED UNFAIR LABOR PRACTICES

A. Introduction

At all times material Respondent, Orland Park Motor Cars, Inc., d/b/a Mercedes Benz of Orland Park, has been a Pennsylvania corporation, with an office and place of business in Orland Park, Illinois, engaged in the retail sale, leasing, and service of automobiles.3 That Orland Park place of business is located on the north side of 159th Street, a State route which is a major two-way, four-lane thoroughfare, with two lanes for westbound traffic and two lanes for eastbound traffic. Next to Respondent's facility on the east, in the same block, is a bank; next to Respondent on the west, in the same block is a BMW dealership. Thus, on the north side of that one block fronting on 159th Street, traveling west from its intersection with 84th Street, are a bank, Respondent's facility, and the BMW dealership. Across the street from Respondent, on the south side of 159th Street, is a Cadillac dealership and, apparently, a Shell service station.

Moving north toward Respondent's facility from 159th Street's north edge is a grass parkway, paralleling that street, a sidewalk and, then, a border of lava rocks extending south to north from the sidewalk to the edge of Respondent's parking lot. Four rows of vehicles are ordinarily parked from the edge of that parking lot back toward Respondent's building. The two rows of vehicles closest to the south edge of the parking lot are used cars. The interior two rows of cars, as one proceeds toward the building, are new cars. Respondent' building has customer and office areas located in the front or south section. Also located in that building are service areas. Technicians or mechanics work in the front; wash bays and other cleaning areas are located in the back where, in addition, detailing is performed.

Vehicle access to the service areas is through three doors on the east-bank-side of the building. A south-north driveway, wide enough to accommodate entering and exiting vehicles, runs to those doors from 159th Street along the east side of used and new car parking areas and Respondent's building. Orland Park Patrol Officer Troy Siewert estimated that the driveway runs approximately 200 to 250 feet from 159th Street to the service door entrances. The portion of the driveway immediately adjacent to 159th Street is divided by an island or median, to separate vehicles entering from and exiting onto 159th Street.

The vice president and general manager of Respondent is Barry L. Taylor. Its general sales manager is David Nocera and its service manager is Michael Maus. Respondent admits that, at all material times, each of those individuals has been a statutory supervisor and its statutory agent. In addition, Taylor testified that New Car Sales Manager Tom Sansone, Used Car Sales Manager Jim Miller, and Parts Manager Rick Vistarta each possess supervisory authority over Respondent's employees, though not the power to terminate employees.

At its Orland Park facility Respondent employs sales people, cashiers, and service advisors or writers, classifications involved only tangentially in this proceeding. More directly involved are employees classified as technicians or mechanics. Most directly involved are employees in the classifications of porter, hiker, detailer, parts department employees, and driver. Drivers pick up parts from manufacturers and suppliers and bring them to Respondent; they also deliver parts for Respondent to body shops, dealerships and other purchasers. A shipping and receiving employee receives and checks in parts received by Respondent from manufacturers and suppliers, returning those which are defective, and, also, ships parts to customers. Employees classified as counter or parts counter employees are responsible for selling parts and, in addition, for counting and stocking or putting away parts which have been received by Respondent.

As might be expected, employees classified as detailers perform detail work on vehicles and, also, vacuum and clean cars on which they perform that work. Employees classified as hikers pick up cars from customers' locations and return serviced cars to customers, as well as drive customers, who have brought their cars to Respondent for servicing, to their destinations, such as places of employment or homes. In addition, hikers deliver cars to and bring cars from auctions or other dealers and, when necessary, pick up and deliver parts.

Porters wash and clean cars, perform minor maintenance on cars, put gas in cars, and otherwise get them ready for delivery. They also sweep sidewalks and the facility's new and used car parking areas. When necessary, they pick up and deliver parts and, also, pick up customers or take them to their destinations.

During 1998 an unsuccessful effort was made by International Association of Machinists and Aerospace Workers, Local Auto Mechanics 701 (Machinists), to organize Respondent's technicians or mechanics. Some of those employees' renewed interest in representation led to another organizing effort by Machinists during the late summer of 1999. As discussed in greater detail in subsection B below, when interest in representation was also expressed by some of the porters, detailers, parts department employees and drivers, a parallel organizing effort among those employees was initiated by International Brotherhood of Teamsters, Local No. 731, AFL–CIO—a labor organization within the meaning of Section 2(5) of the Act—(the Union).

Those two parallel campaigns led to August 30 requests that Respondent recognize the two unions, each as the bargaining agent for employees in the group that it was attempting to represent. As discussed in subsection D, both recognition requests were rejected by Taylor. Both unions then led out on strike the employees whom they were attempting to represent. Within a few days the technicians abandoned the strike and, apparently also, their interest in representation by Machinists which, then, abandoned its interest in representing them. In contrast, the Union continued to become the bargaining agent of the employees whom it had been organizing. It is with respect to those employees that the complaint's allegations are concerned.

The complaint alleges that on August 27 Service Manager Maus coercively interrogated employees about union activities and, in addition, threatened to discharge whomever had started the unionizing effort at Respondent. It is further alleged, by way of amendment made during the hearing, that Vice president and General Manager Taylor had unlawfully threatened employees that it would be futile for them to elect representation by the Union. Those allegations are discussed and considered in subsection C below. Discussed and considered in subsection E below is the allegation that, continuously since August 30, Service Manager Maus and Used Car Manager Miller had unlawfully engaged in photographic surveillance of employees' strike line activities.

Discussed in subsection F below is the allegation that on September 2 General Sales Manager Nocera had threatened employees with physical harm to discourage them from striking. Another allegation discussed therein is that, on that same date, Finance and Insurance Manager Todd Koleno (sometimes referred to as Business Manager Koleno), had threatened employees with discharge to discourage their support for the Union. The General Counsel and Union contend that Koleno had been a statutory supervisor and agent of Respondent at all material times. Respondent denies both of those contentions, as well as the allegations of unlawful conduct on September 2.

The complaint further alleges that, on September 3, Service Dispatcher Al Sizemore unlawfully threatened discharge of employee Brad Patrylak and that, in fact, that Respondent did discharge Patrylak on that date because of his union and strike support, as described in subsection G below. The General Counsel and Union contend that Sizemore had been a statutory supervisor and agent of Respondent at all material times; Respondent denies those contentions, as well as any unlawful conduct on September 3.

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[2] Certain errors in the transcript have been noted and corrected.

[3] Respondent admits that at all material times it has been an employer engaged in commerce within the meaning of Sec. 2(2), (6), and (7) of the Act, based on the admitted factual allegations that, in conducting those business operations during past calendar years, Respondent derived gross revenues in excess of $500,000 and, further, purchased goods valued in excess of $50,000 which were received at its Orland Park facility directly from points outside of the State of Illinois.

As also described in subsection G, the complaint alleges that unconditional offers to return to work on behalf of all striking employees were made on September 29 when union representatives and a group of named striking employees entered Respondent's facility. That allegation is admitted in Respondent's answer. On that occasion, the representatives and striking employees spoke with General Sales Manager Nocera. During that conversation, it is alleged, Nocera unlawfully told them that the striking employees had been terminated. Respondent denies that Nocera had made such a remark. However, its answer admits the allegation that "[s]ince on or about September 30, 1999, Respondent, by letter and verbally, has failed and refused to reinstate the striking employees" who had made unconditional offers to return to work, as well as those on whose behalf like offers had been made by the Union.

In that regard, the General Counsel alleges that because of Respondent's unfair labor practices, the strike which had commenced as an economic strike was converted to an unfair labor practice strike on September 1. In addition, Respondent admits that it terminated porter Michael Chiarito on September 30, but denies that it had done so for any reason other than misconduct engaged in by Chiarito while striking. The General Counsel and Union further argue that by having rejected the Union's request for recognition, Respondent unlawfully refused to recognize and bargain with the Union, in violation of Section 8(a)(5) and (1) of the Act, and, in any event, that Respondent's unfair labor practices were so serious and substantial in character as to have a lingering effect which warrants issuing a remedial bargaining order. The facts concerning these allegations are also discussed in subsection G below. Resolution of the allegation concerning the two discharges, the status of Respondent's failure to reinstate the other strikers, and the refusal to recognize allegation and bargaining order remedy are discussed in section II, infra.

Before proceeding to succeeding subsections, there is one novel situation which warrants discussion. During the underlying investigative phase which led to issuance of the now-consolidated complaints, cocounsel for Respondent submitted two statements of position, one dated (on pages other than the first one) September 24 and the other dated September 30. These statements deny many of the unlawful statements and actions alleged in the charge in Case 13–CA–38061 or disclosed by the stage which investigation had reached by that point. That is not terribly surprising. However, certain other aspects of those position statements are worth noting, given the controversy which has arisen concerning utilization of the position statements' contents.

First, in both statements cocounsel addresses the aforementioned the surveillance allegation discussed in subsection E below. Acknowledged in the one of September 24 is the fact of videotaping and photographing by Respondent of picketing: "Respondent has photographed strikers since August 30, 1999 solely for the purpose of documenting instances of mass picketing and picket line misconduct, including, but not limited to, harassing customers, blocking ingress/egress from its premises and violations of city ordinances relating to placement of object on the parkway." Asked for greater detail regarding those asserted acts of misconduct, the September 30 position statement specified "frequent confrontations begin [sic] picketers and customers, employees, vendors and clients of" Respondent; "damage to vehicles"; "threats of physical confrontations between striking employees and non-striking employees"; and, violations of "village zoning ordinances related to the placement of objects on the parkway." The position statement continues by stating, "It is the intention and scope of photographing, not what is actually photographed, that is relevant."

Second, with respect to Koleno, whose alleged discharge threat is discussed in subsection F below, the September 24 position statement includes a list of persons—Taylor, Maus (misspelled "Moss"), Clare Sunderland, Nocera (misspelled "Nasaro"), and Koleno—who, it is stated, "are statutory supervisors."

Third, as discussed in subsection G below, it is alleged that Patrylak had been unlawfully threatened with discharge by Sizemore and, in fact, had been unlawfully discharged on September 3. The September 24 statement of position states, "Respondent admits that Sizemore . . . told Patrylak that he had been terminated for being a no-call, no-show for work when Patrylak neither showed up for work or appeared on the picket line. This was based on a misunderstanding on the part of Sizemore as to what his responsibilities in the situation were." The position statement continues by stating that Sizemore "had only been instructed to deliver Patrylak his final paycheck. In making any statement to Patrylak he exceeded his authority and misrepresented Respondent's position vis-a-vis Patrylak's employment." For, according to the September 24 statement of position, "Management made the decision to lock out Patrylak when he was noted to be conducting his own intermittent strike. Patrylak had gone back and forth between striking and working several times before management finally locked him out." Nonetheless, according to that position statement, Patrylak "remains an employee as do all other strikers."

Fourth, as discussed in subsections B and D below, the General Counsel and Union contend that cards, authorizing the Union to serve as the signers' bargaining representative, had been signed by a majority of employees in what has become a stipulated appropriate bargaining unit. In his September 30 statement of position, cocounsel states, "As of August 26, 1999 there were twenty-two employees in the positions petitioned for by" the Union.

Finally, both position statements address the status of workers hired to perform strikers' jobs. For example, the one of September 24 states, "Respondent denies that any employees have been permanently replaced," and essentially that same message—"No employee has been permanently replaced"—is communicated later in that position statement, but accompanied by this caveat: "Replacement workers have been hired to allow Respondent to continue operating. These individuals are permanent employees and will not be laid off when the strike ends, but that does not affect the strikers[‘] status as employees." Asked by Regional personnel to explain that caveat, the September 30 position statement explains: "Respondent's position is quite simple. Employees have been hired since the strike began to allow [R]espondent to continue operating. These are not temporary employees, but permanent employees. The strikers are still employees."

It is hardly novel for a charged party or its representative to submit position statements following the filing of charges. All else aside, such statements can serve the useful purposes of eliminating some potential issues, which might otherwise have to be resolved in litigation, and of narrowing the areas of dispute in connection with issues which must be litigated. What is novel here is an identically worded footnote which was included in both the September 24 and 30 statements of position:

> The statement of facts and position set forth herein are based upon an investigation of the facts at the time of this statement of position. By submitting this position statement, however, Respondent in no way waives its right to present new or additional facts or arguments based upon subsequently acquired information or evidence. Further, this statement of position, while believed to be true and correct, does not constitute an affidavit and is not intended to be used as evidence of any kind in an NLRB or court proceeding in connection with the above-referenced charge, but is intended solely for the purpose of your agency's investigation and settlement discussions between the parties.

That footnote in the September 24 position statement did not escape the Region's notice.

By letter dated September 28, the Acting Regional Director told cocounsel that "in accordance with established law and Agency procedures, statements of fact and position provided by counsel may be introduced as evidence" during unfair labor practice hearings, with authority cited for that assertion. The letter continues by stating, "I cannot accept your attempt to restrict the use of such documents," and, "[i]f you do not wish for us to consider you position letters [sic] without any restrictions on their use," offers to return the September 24 statement of position. At no point, so far as the record discloses, did cocounsel seek return of that statement of position.

Instead, he responded to the Acting Regional Director by letter dated September 29, stating in pertinent part:

> As our letter indicated, that statement of position was true and complete based upon the information available to us at that time. While we have no reason to believe at this time that anything contained therein will change; [sic] it would be impossible to attest that future investigation will not cause us to restate our position on some matter. As such, our September 27 [sic], 1999 letter merely informed the Board that it might be necessary for us to disavow the statement at some point in the future. Such an action is clearly permissible under Board precedent. *Hogan Masonry, Inc.,* 314 NLRB 333 n. 1 (1994); *Masillon Commu-*

> *nity Hospital*, 282 NLRB 675 n. 5 (1987)[;] *Florida Steel Corp.,* 235 NLRB 1010, 1011–1012 (1978).
>
> Therefore, while we do not wish to withdraw our September 27 [sic], 1999 statement of position, we will not waive our right to disavow it in the future should circumstances warrant. Please inform us if the Region's position is that this reservation of right constitutes an impermissible restriction on use, and, if so, your legal support for that position.

By letter dated December 30, 4 days before the hearing was scheduled to commence on January 3, 2000, cocounsel informed cocounsel for the General Counsel: "This is to inform you that Respondent is exercising its right to disavow any and all Position Statements that it previously filed with the Region in its investigation of Charge No. 13–CA–38061 (including the original, 1st amended and 2nd amended charges) and of Charge No. 13–CA–38185." No reason was advanced in the letter for so belated a disavowal, not was it represented during the hearing that the wholesale disavowal had been "based upon subsequently acquired information or evidence."

It is accurate that in cases relying upon statements contained in prehearing letters and statements as admissions, the Board, in each of those cases cited in cocounsel's September 29 letter, pointed out that there had been no disavowal of admissions, following their submissions during the investigations. Thus, in footnote 1 of *Hogan Masonry*, 314 NLRB 333 (1994), the Board noted, "*Masillon Community Hospital*, 282 NLRB 675 fn. 5 (1987), citing *Florida Steel Corp.*, 235 NLRB 1010, 1011–1012 (1978), wherein the Board held that in the absence of prehearing disavowal of a position . . . the letter may be relied on by General Counsel in preparation of his case and is admissible as an admission against interest." Setting aside the question of whether there is such an animal as "admission against interest" under Fed.R.Evid. Rules 801(d)(2) and 804(b)(3), it is a good question whether, by mentioning "prehearing disavowal of a position letter," the Board intended to invite—to endorse—wholesale disavowals, at the 11th hour, of statements of position submitted during investigations of charges which have progressed to complaint and hearing.

After all, even when made under pressure of time deadlines, statements by attorneys representing parties are excluded from the definition of hearsay because of the very fact that they constitute admissions by a party-opponent. See *McKenzie Engineering Co.*, 326 NLRB473, 485 fn. 6 (1998), enfd. 182 F.3d 622 (8th Cir. 1999). Once made, "a party should be entitled to rely on his opponent's statements." *U.S. v. DiDomenico*, 78 F.3d 294, 303 (7th Cir. 1996). True, the two statements of position were submitted during an investigation, when the role of the General Counsel was that of investigator, as opposed to that of opponent. Still, administrative agencies, presumably no less than United States District Courts, "are entitled to hold counsel to their representations of what is important," U.S. *v. Purdy*, 144 F.3d 241, 245 (2d Cir., 1997), and, of course, the disavowal did not occur here until after both complaints had issued and been consolidated for hearing. By that time, the General Counsel was very much a party-opponent. Furthermore, not to be overlooked is the holding that "giving false statements to the government is a felony . . . as well as an act for which an attorney . . . may be disciplined." (Citations omitted.) *Inter-Neighborhood Housing Corp. v. NLRB*, 124 F.3d 115, 121 (2d Cir. 1997).

Even so, restraint should be exercised before hastily faulting counsel for having engaged in some form of impropriety. To be sure, such action does seem to treat unfair labor practice proceedings as some sort of "Donny Brook fair" in which counsel regards himself free to act as "a Don Quixote tilting at windmills for the feel of the fighting." *Winn & Lovett Grocery Co. v. NLRB*, 213 F.2d 785, 786 (5th Cir. 1954). Yet, such a course may, instead, represent no more than an effort by counsel to protect against suspected unreliability of what is being said to counsel by the client. "It is a rare attorney who will be fortunate enough to learn the entire truth from his own client." *Wheat v. U.S.*, 486 U.S. 153, 163 (1994).

Such concern is not limited merely to what the attorney is told by a client as a case is being investigated. It plausibly extends, as well, to what a client may still be willing to say in light of issuance of a complaint after an investigation has been completed—whether or not the client is still willing to say what that client had been saying during the investigation, in view of a client's awareness that adherence to statements made during investigation may lead to conclusions that unfair labor practices were committed. By the hearing stage, indeed, an attorney may be left vulnerable to sometimes abrupt changes in statements made to counsel before the hearing or, even, at counsel table during hearing, when that client later testifies. See, e.g., *Golden Cross Health Care of Fresno*, 314 NLRB 1201, 1209 (1994), and *Altorfer Machinery Co.*, 332 NLRB No. 12, slip op. at 123, 136 (2000).4 So, in light of what has been said by Courts of Appeals, it would not necessarily be surprising for an attorney to take a guarded approach when repeating statements made by a client whose reliability that attorney may question.

At some point the Board may want to clarify its language in the above-cited cases regarding disavowals of attorney-representations of fact made during investigations. Here, however, despite the heat generated by argument concerning the position statements, it is not necessary to resolve what motivated their above-quoted footnotes and ensuing events. Resolution of the issues presented here can be made without resort to what is said in those statements of position. For, as discussed in succeeding subsections and in section II, infra, in some areas the record is left without any explanations for certain actions and, in others, is left without denials by Respondent, or with ineffective denials, respecting certain statements and actions attributed to Respondent's statutory agents. That latter point should not pass at this point without some explanation.

Long past is the day when the rule was "that where a witness's testimony is not contradicted, a trier has no right to refuse to accept it." *NLRB v. Ray Smith Transport Co.*, 193 F.2d 142, 146 (5th Cir. 1951). "This is an ancient fallacy which somehow persists despite the courts' numerous rulings to the contrary." *NLRB v. Howell Chevrolet Co.*, 204 F.2d 79, 86 (9th Cir. 1998), affd. on other grounds 346 U.S. 482 (1953). "The hospital seems to assume that testimony that is not specifically contradicted must be believed; this is incorrect." (Citations omitted.) *Kasper v. Saint Mary of Nazareth Hospital*, 135 F.3d 1170, 1173 (7th Cir. 1998). Nevertheless, while it need not be blindly credited, neither can uncontradicted testimony simply be evaluated on the same plane as testimony which is contradicted. "Although the Board may dismiss or disregard uncontroverted testimony, it may not do so without a detailed explanation," *Missouri Portland Cement Co. v. NLRB*, 965 F.2d 217, 222 (7th Cir. 1992), presumably based upon valid factors considered in light of the other party's failure to put such testimony in issue by offering testimony, or other evidence, to dispute it. Having failed to meet a so relatively minimal burden of presenting its own agents' testimony to refute damaging testimony adduced by the opponent, a party is hardly in a position to complain about weight being accorded to the lack of contradiction of that damaging testimony.

B. Initiation of the Union's Organizing Campaign

As mentioned in the preceding subsection, the August 1999 organizing campaign at Respondent was initiated among technicians or mechanics by Machinists. That union's organizer, David Mullin, met with a group of those employees on August 16 and another meeting was scheduled for August 24 at Georgio's Banquet Hall, "just down the street from" Respondent, testified Mullin.

At some point prior to that August 24 meeting, technician Chad Burns spoke with porter Michael Chiarito. According to Chiarito, Burns expressed the technicians' dissatisfaction with existing wages and benefits at Respondent, and said "that it was time to get a union." When Chiarito replied that such a course "sounded good to me," Burns asked if porters and service personnel other than technicians might be interested in unionizing. Chiarito said that he would "spread the word and ask everybody else." Burns gave Chiarito one of Mullin's business cards and Chiarito testified that he then pursued two courses.

First, he testified, "I talked to like all the porters, detailers, the parts guys," whenever he "got like a minute or two during the day, at lunch or something," while at work. From these exchanges, Chiarito ascertained that there was at least some support among those employees for representation. Second, he testified that he telephoned Mullin who provided Chiarito a telephone number for Anthony C. Avalos, business agent for the Union, which traditionally represents porters, detailers, parts department employees and drivers, at least in the Chicago area. Chiarito contacted Avalos and explained that some of Respondent's employees desired a

[4] Of course, *Altorfer* is not being cited for any precedential purpose; merely for an illustrative one.

meeting with the Union. Avalos agreed to conduct one at the same time and place as Machinists would be meeting with the technicians on August 24. Following that conversation with Avalos, Chiarito testified that, during succeeding days, he spread the word to other employees about that meeting, while they were working at Respondent's facility.

Respondent contends that Chiarito was not a credible witness. Obviously, not only was he a supporter of the Union—and, presumably, of its interest in becoming the bargaining agent of Respondent's employees in the appropriate bargaining unit described in subsection D below—but he also stands to benefit from a reinstatement and backpay order should his discharge be held to have been unlawfully motivated, as the General Counsel alleges. In fact, as he testified, it did appear that there were times when Chiarito embellished some of his accounts about events which he was describing. Nonetheless, there is considerable support for his above-described testimony about having contacted the Union and having been the employee who was most prominent in passing the word about the Union to his coworkers.

While he made no mention of a telephone conversation with Chiarito prior to the August 24 meeting, Avalos testified that he had been told by Mullin that employees, other than technicians, of Respondent were interested in representation and that there would be a meeting on August 24 at Georgio's. In turn, Mullin agreed that he had told Avalos about the August 24 meeting. Mullin further testified that interest in representation by employees other than technicians had been brought to his attention by Chiarito "on the phone."

Several employees testified that talk about the Union had been occurring throughout Respondent's facility. Thus, parts driver Kevin Mataczynski testified that, during August, porters and technicians "mentioned things to me" about union organizing and, further, that he had "heard throughout the shop" about a union trying to organize Respondent's employees. Parts driver Michael Dybas testified that "several of my coworkers" had spoken to him about a union trying to organize Respondent's employees. Detailer Gerald Pollastrini testified, "Everybody was just trying to form a union together, I mean, this was the talk in the shop." More significantly, employees interrogated more specifically about the subject singled out Chiarito as having been the one employee who had been asking about their interest in unionizing and their willingness to meet with the Union.

Thus, porter Michael Dove testified that he learned about the Union from "Mike Chiarito" who had "said that we can go talk to Union representatives and we'd have a meeting with them." Detailer Patrylak testified that he first learned of the organizing effort "[f]rom Mike Chiarito" who "said that we're think[ing] about organizing a union or something like that. And he says, would you be . . . would you do it if we want to do it as a shop." Similarly, detailer Pollastrini testified that Chiarito had "said he was going to try to form a union and I said, okay."

In fact, only parts driver Dybas identified an employee other than Chiarito as the source of information about a possible organizing campaign. "I believe Kevin Mataczynski had said something about it," testified Dybas. Still, he seemed uncertain of that fact, repeating "I believe," and adding, "I don't recall who else had mentioned it." Given the above-described testimony regarding talk about unionizing occurring throughout Respondent's facility during August, the fact that Dybas may have heard about the organizing campaign from someone other than Chiarito hardly means that the latter had not been the leading activist in discussing organizing and the August 24 meeting. At that, Mataczynski, the employee from whom Dybas believed that he had heard about a possible organizing campaign, attributed his knowledge of that campaign to Chiarito. That is, Mataczynski testified, "Mike Chiarito mentioned [a union] to me. He was the only porter that actually mentioned it to me." According to Mataczynski, Chiarito had asked, "What do you think of the union? What do you think of the union coming for this dealership?"

Four conclusions can be reached from the foregoing testimony. First, it shows that during August talk about the possibility of organizing had been occurring with some frequency throughout Respondent's facility. Second, it corroborates Chiarito's testimony that he had been discussing the possibility of becoming represented with coworkers at that facility. Third, it shows that it had been his contacts with, at least, Machinists which had initiated the Union's interest in campaigning for representation among Respondent's porters, detailers, parts department employees, and drivers. Finally, it shows that while other employees had discussed the possibility of unionizing, Chiarito had been the foremost—the most prominent—union activist among Respondent's porters, hikers, detailers, parts department employees, and drivers.

Machinists and the Union did conduct their meeting with Respondent's employees on August 24. Organizer Mullin made a presentation on behalf of Machinists to the technicians or mechanics in attendance; Avalos made a similar presentation on behalf of the Union to the other service employees in attendance. A sign-in sheet was circulated among and signed by those in attendance. Union literature was distributed. Also distributed were cards authorizing the Union to represent employees other than technicians or mechanics, to whom Machinists distributed similar cards on its own behalf.

The cards distributed by Avalos are of a type which have come to be called "single-purpose" or "pure" cards. See, e.g., *Ona Corp. v. NLRB*, 729 F.2d 713, 723–724 (11th Cir. 1984); *Penn State Education Assn.-NEA v. NLRB*, 79 F.3d 139, 144–145 (D.C. Cir. 1996). That is, they state only designation of a bargaining agent, without mention of a possible representation election. Thus, printed near the top of the cards is the legend, "Authorization for Representation Under the National Labor Relations Act," and, in pertinent part, below that is stated, "undersigned employee" of a filled-in company, "authorize[s] Teamsters Local 731 . . . to represent me in negotiations for better wages, hours and working conditions." "Thus, where the card on its face clearly declares a purpose to designate the union as collective-bargaining representative, the only basis for denying face value to the authorization card is affirmative proof of misrepresentation or coercion." (Citation omitted.) *DTR Industries*, 311 NLRB 833, 839 (1993), relying upon *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 606 (1969). There is no evidence of any such misrepresentation during the August 24 meeting.

Presented when Avalos testified were authorization cards assertedly signed by porters Chiarito, Dove, and Jason Patt, by detailers Pollastrini and Patrylak, and by parts drivers Dybas and Mataczynski.5 Avalos testified that he had distributed a blank card to each of those employees and had received back a signed card from each of them. Although Avalos did not claim that he had seen each card actually being signed, it is settled that signatures on authorization cards can be authenticated "by testimony that the signer had returned the card to the union agent, thus adopting as his own the signature thereon." *Amalgamated Clothing Workers of America v. NLRB*, 419 F.2d 1207, 1209 (D.C. Cir. 1969), cert. denied 397 U.S. 988 (1970), citing *NLRB v. Howell Chevrolet Co.,* supra, 204 F.2d at 85–86. For, "the Board does not require personal authentication by each card signer," *Amber Delivery Service, Inc.*, 250 NLRB 63, 65 (1980). In any event, by conclusion of the General Counsel's case-in-chief, all seven of those employees had personally authenticated their signatures on the cards identified initially by Avalos. Even so, there are certain other aspects about two of those cards which should not pass without disposition.

The seven above-mentioned cards were assertedly signed at a meeting conducted on August 24. In fact, five of them bear that date. However, Pollastrini's card bears the date "8–21 99," and Patt's card is dated "8–25–99." Nevertheless, Pollastrini testified that he had attended the August 24 meeting and that it had been during that meeting when he had signed the card bearing his signature. Thus, so far as the evidence reveals, Pollastrini merely had misdated his card. That does not somehow invalidate it, inasmuch as "misdating of cards does not affect their validity as a showing of union support." *Axton Candy & Tobacco Co.*, 241 NLRB 1304 fn. 4 (1979). To allow invalidation to occur merely because of a card's misdating "would be to sacrifice substance for form," *Ultra-Sonic De-Burring*, 233 NLRB 1060, 1067–1068 (1977), enfd. 593 F.2d 123 (9th Cir. 1979).

Not only does Patt's card bear a date other than August 24, but, in the space provided on the card for insertion of the signer's employer's address, someone other than Patt had handwritten Respondent's address. Yet, Patt acknowledged that the signature and other writing on the card is his own, including the date "8–25–99." He also acknowledged having attended Machinists and the Union's joint meeting on August 24 at Georgio's. In fact, his name appears on the

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[5] In his initial enumeration of employees in attendance at the August 24 meeting, Avalos omitted mentioning Mataczynski's name. There can be no question, however, that Mataczynski had been in attendance at the Georgio's meeting. He testified that he had attended that meeting. His name appears on the above-mentioned sign-in sheet. In fact, at another point in his testimony, Avalos explained that as he had distributed the cards during the meeting, "I believe next to [Chiarito] was Kevin," and there is no evidence of any "Kevin" employed by Respondent during August, other than Mataczynski.

sign-in sheet. Thus, to the extent that he card is misdated, the discussion in the immediately preceding paragraph leads to the conclusion that his card is not rendered invalid by that fact.

Nor is it invalidated by the fact that someone other than Patt handwrote Respondent's address on the card. The significant entry, obviously, is Patt's signature. And he acknowledged that he had written the signature which appears on the card. Given that acknowledgment, "the fact that an individual other than the one whose name appears on the card completed it or added certain information does not destroy its validity," *Laidlaw Waste Systems*, 305 NLRB 30, 38 (1991), relying in part on *Limpert Bros.*, 276 NLRB 364, 368 (1985) (card signed by Susan Johnson). Yet, not to be overlooked are certain aspects of Patt's situation by the time of the hearing, in connection with his testimony regarding the circumstances under which he had signed the card.

As discussed further in subsection G below, Patt abandoned the strike and returned to work on the morning of August 29, before the unconditional offers to return to work were made later that same day. Of course, the fact that Patt chose to abandon the strike does not, standing alone, constitute abandonment of his previously expressed support for the Union, by having signed a card authorizing it to represent him—"a nonstriker or a strike crossover[ ] may disagree with the purpose or strategy of the particular strike and refuse to support that strike, while still wanting that union's representation at the bargaining table." *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 789 (1990)—nor, concomitantly, does it nullify the ongoing validity under the Act of the authorization card which he had signed. So far as the record shows, neither when abandoning the strike, nor at any point thereafter, did Patt take the least unambiguous affirmative action to revoke the Union's representative status which he authorized by admittedly having signed one of its authorization cards. Cf. *Struthers-Dunn, Inc. v. NLRB*, 574 F.2d 796 (3d Cir. 1978); *TMT Trailer Ferry, Inc.*, 152 NLRB 1495, 1496 (1965).

Even so, by the time that he testified Patt remained employed by Respondent, in contrast to porters who had remained on strike until the late-afternoon August 29 offers to return to work. Not surprisingly, given that fact and the unfair labor practices found, in succeeding subsections and in section II, infra, to have been committed, it appeared that, while a witness, Patt was trying to tailor his testimony, to the extent that he perceived possible, to detract from and damage the Union's position, with the ultimate object of ensuring Respondent's willingness to continue employing him. With respect to having signed an authorization card Patt advanced a somewhat bizarre—and, in the end, of no consequence—scenario.

He conceded that he had attended Machinists and the Union's August 24 meeting. It would have been implausible for him to have denied that fact, given that he had signed the sign-in sheet circulated during that meeting and that his coworkers had seen him there. Yet, he denied having signed his authorization card at that meeting. Instead, for whatever reason he believed might diminish the Union's position, Patt testified, "I signed a card before that at [Respondent] itself." Not one fact supports such testimony. There is no evidence that the Union had made blank authorization cards available to any of Respondent's employees prior to the August 24 meeting. Nor did any other employee-witness testify that signatures on such cards had been solicited at Respondent prior to that meeting. Indeed, the "8–25–99" date which Patt concededly wrote on his card is inherently inconsistent with his testimony about having signed the card before August 24. In sum, there simply is no objective or other evidence even tending to support Patt's testimony that he had signed his authorization card before the Georgio's meeting. Rather, a preponderance of the credible evidence supports a conclusion that, as with the other above-named six card signers, Patt had signed his authorization card during the August 24 meeting.

It would be fruitless to speculate on how precisely Patt had felt, while testifying, that he could somehow undermine the Union's position by claiming to have signed his card before the Georgio's meeting. What can be said with certainty is that his account of earlier card-signing, in the end, tended to buttress a conclusion that Chiarito had been the leading proponent of the Union among Respondent's employees. For, in the course of trying to portray his card signing as having occurred prior to August 24, Patt chose to identify "Mr. Chiarito" as the person who had given the blank card to him for signature. Though his testimony about the date and circumstances of having signed his card is not credible, Patt's identification of Chiarito as the person who purportedly had given him that card is a further indication of Chiarito's role as the leading employee-supporter of the Union.

It may be that Patt had been given a blank card at the Georgio's meeting, but had not actually signed it until the following day—"8–25–99"—and, then, had returned it to Chiarito that same day. Such a conclusion would be sheer speculation, given the state of the record. Even if that had been what occurred, however, that would not preclude consideration of Patt's card in calculating whether or not the Union enjoyed majority support in the stipulated appropriate bargaining unit. For, it is undisputed that the Union had possessed Patt's signed card by August 29.

The fact is that Chiarito had been circulating blank cards, and collecting signed ones, in the immediate wake of the August 24 meeting at Georgio's. Chiarito testified that, during the Georgio's meeting, he had told Avalos "there were some porters and some drivers and some of them parts guys that couldn't make it" to the meeting, and had asked "for cards so I could give it [sic] to them so they could get represented, too, if they would like." Avalos "gave me I think five cards," testified Chiarito.

As with other above-described aspects of his testimony, that account by Chiarito tends to be corroborated. Avalos testified that while he was uncertain whether it had been Chiarito who had done so, "one of the gentlemen there instructed me that there were some more follows" who "couldn't be at the meeting," and "he would like to take those cards to these guys because they also wanted to be represented or be part of the Union, also." Beyond that, as described below, other employees testified that Chiarito had solicited their signatures on cards, following the August 24 meeting. In the end, five cards signed after August 24 were produced during the hearing.

Chiarito testified that, following that meeting, he had solicited and obtained signatures on those five cards from parts driver Theodore Kalinowski, from shipping and receiving employee Christopher Allen Shelton,[6] and from porters Brian Charles Katzberger, William Holicz, and Steve Ciambrone. Neither Kalinowski nor Holicz described the circumstances under which he had obtained an authorization card. But, both testified to having filled out and signed cards bearing their signatures. Kalinowski's card is dated August 24; Holicz' card is dated August 26. Even had Kalinowski misdated his card, which appears to have been the fact, under the principles set forth above that would not invalidate the card's authorization for the Union to act as Kalinowski's collective-bargaining representative.

Katzberger, another porter who, like Patt, had returned to work before the offers to return were made by other strikers, testified that he had not written the "8–25–99" date on the card bearing his signature. As pointed out above, a card is not invalidated by the fact that someone other than the signer added something to it. *Laidlaw Waste Systems,* supra. Indeed, even backdating does not necessarily invalidate a signed authorization card. See, e.g., *NLRB v. Vancouver Plywood Co.*, 604 F.2d 596 (9th Cir. 1979), cert. denied by *Fort Vancouver Plywood Co. v. NLRB*, 445 U.S. 915 (1980); *Ultra-Sonic De-Burring,* supra. The crucial questions in such situations are whether, in fact, the employee did sign the card and whether, in fact, the card had been signed by whatever date recognition was demanded. Katzberger acknowledged that the signature on the card was his; he testified that he had, in fact, signed that card.

Katzberger further testified that the "8–25–99" date on the card was "pretty close" to the date on which he had signed it: "Around the same time." Moreover, Katzberger testified that he had signed the card "along with all the other parties." There is no evidence that any of Respondent's porters, detailers and parts department employees and drivers had signed a card after August 29. Finally, Katzberger testified that, in the process of giving him the card, Chiarito had mentioned "we *would be* walking out." (Emphasis added.) As discussed in subsection D below, before approaching Respondent to request recognition both unions, and at least some of the employees who had signed their respective authorization cards, had planned to walk out if the requests for recognition were rebuffed. Inasmuch as Chiarito spoke in the future tense about "walking out," obviously he had solicited Katzberger's signature before the strike began on August 30, as discussed in subsection D below. Thus, Katzberger's testimony shows that, whatever date someone had chosen to place on the card, he had signed it before the recognition request and commencement of the strike. That testimony also corroborates Chiarito's testimony that he had been soliciting signatures on cards following the Georgio's meeting.

Ciambrone also testified that he had gotten the card, which he acknowledged having signed, from Chiarito. After passage of a day, he further testified, he had signed it on August 26, the

[6] Not to be confused with parts department counter person Daniel L. Shelton.

date on the card, and had returned the signed card to Chiarito. Nonetheless, further discussion is warranted concerning one aspect of solicitation of Ciambrone's signature. As pointed out above, "single-purpose" or "pure" authorization cards are regarded as valid unless their solicitation was accompanied by misrepresentations of the solicitor. As was true during the August 24 meeting, there is no evidence that Chiarito had said anything to Kalinowski, Holicz, Katzberger, or Ciambrone—nor, for that matter, to Christopher Shelton—about a possible representation election.

Even so, Ciambrone testified that, in the course of being solicited to sign a card, Chiarito had said, "[W]e're going to get better wages, better treatment" and, of greater import, that "everybody was joining to be represented by the Union 731." There is no evidence that Chiarito had made like statements to any of the other four employees whose signatures he solicited. The question, then, is whether those remarks to Ciambrone tainted the card which the latter acknowledged having signed.

It seems well settled that promises of better benefits, if employees sign authorization cards, are not regarded as statements that constitute misrepresentations, such that a "single-purpose" or "pure" card could be invalidated by those statements. As a general proposition, "[u]nions exist for the purpose, inter alia, of securing higher pay and increased benefits," *NLRB v. Sauk Valley Mfg. Co.,* 486 F.2d 1127, 1131 (9th Cir. 1973), and, accordingly, promises of such increases have come to be regarded as no more than "the very stuff of electioneering," *Ex-Cell-O Corp. v. NLRB*, 449 F.2d 1058, 1061 (D.C. Cir. 1971). Indeed, Chiarito's "better wages, better treatment" remark to Ciambrone differs little, if at all, substantively from the wording "to represent me in negotiations for better wages, hours and working conditions" which appears on the card which Ciambrone, and other employees, signed. Thus, while recognition of the Union by Respondent would not assure that "better wages, better treatment" would be an inevitable consequence, employees would naturally understand that such improvements would be among the inevitable objectives of a recognized bargaining agent. In sum, such statements are not objectionable in the representation election context, *Olson Rug Co. v. NLRB*, 260 F.2d 255, 256 fn. 1 (7th Cir. 1958), and, concomitantly, do not taint "single-purpose" or "pure" authorization cards.

More troubling is the "everybody was joining" remark to Ciambrone. It has been held that an authorization card can be invalidated by a misrepresentation that cards had been, or were being, signed by a majority of other employees. See, e.g., *Lake City Foundry Co. v. NLRB*, 432 F.2d 1162, 1172 (7th Cir. 1970). Yet, that is not a per se, knee-jerk, holding. Statements about the number of employees who have signed cards, even misrepresentations, "do not establish a per se rule invalidating any card solicited in connection with such misrepresentations. Rather, the circumstances surrounding such solicitations have been considered." (Footnote omitted.) *Montgomery Ward & Co.*, 288 NLRB 126, 128 (1988). For, a "statement that 'everybody' had signed seems like little more than salesmanship or mild puffery." *Mid-East Consolidation Warehouse*, 247 NLRB 552, 560 (1980). In other words, like statements about obtaining better benefits, statements that everybody had signed cards are one aspect of "the very stuff of electioneering," *Ex-Cell-O Corp. v. NLRB,* supra, which employees likely would anticipate that card-solicitors would be making—"customary campaign propaganda with which employees are familiar." *Montgomery Ward & Co.,* supra.

There is no evidence of any concerted plan by the Union—and, more particularly by Chiarito—to misrepresent the number of signers to create a "band wagon" effect about support for the Union. Cf. *Schwarzbach-Huber Co. v. NLRB*, 408 F.2d 236, 241 (2d Cir. 1969); *NLRB v. Roney Plaza Apartments*, 597 F.2d 1046 (5th Cir. 1979). At most, such a statement had been made to but a single employee, so far as the evidence discloses. Moreover, there is no showing that Chiarito's remark to Ciambrone had been made during a hostile conversation—had been "accompanied by coercive statements or actions or any suggestion that [Ciambrone's] failure to sign would result in reprisal by the employees who had already signed" cards. *Montgomery Ward & Co.,* supra.

Beyond that, it would be difficult to conclude that, in fact, Chiarito had made what rises to the level of "misrepresentation" to Ciambrone. So far as the evidence discloses, by the time that Chiarito approached Ciambrone, every employee solicited had signed a card. There is no evidence that any employee approached by Chiarito or the Union, during its August 24 meeting, had rebuffed a solicitation and refused to sign one of the authorization cards. Thus, it is difficult to conclude that Chiarito's "everybody was joining" remark constituted, in fact, a misrepresentation. Furthermore, there is no basis for concluding that Ciambrone had signed his card for no reason other than the Chiarito's representation that "everybody was joining" and, indeed, there is no evidence that Ciambrone ever thereafter sought to disavow the designation of representative status which he made by having signed the card. In view of the totality of these considerations, I conclude that nothing said by Chiarito to Ciambrone invalidated the card which the latter signed.

The foregoing discussion leads to the conclusions that eleven employees personally authenticated their authorization cards and that each of those cards is a valid designation of the Union as the bargaining representative of the employee who signed it. In addition, a twelfth card—that of shipping and receiving employee Christopher Allen Shelton—was produced during the hearing. But, Shelton was not called as a witness and, accordingly, the card assertedly bearing his signature has not been personally authenticated.

Neither the General Counsel nor Union explained during the hearing why Shelton had not been called as a witness to personally authenticate the card bearing his signature. Given the fact that every other card signer had been called to personally authenticate the card bearing his signature, in some situations Shelton's nonappearance might be some indication that, if called as a witness, Shelton would not authenticate his card—that he would deny having signed the card. However, an explanation for his nonappearance is provided by Respondent's brief: "Shelton, who was subpoenaed to testify for the [Union], failed to appear on its behalf. Of course, that could be because Shelton was attempting to avoid given false testimony about having signed a card. On the other hand, the Supreme Court has recognized the reluctance of employees, generally, to give testimony damaging to their employers. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 608 (1969). So far as the record shows, Shelton continued to be working for Respondent during the hearing.

To be sure, upon application by the Union, the Board could have instituted proceedings before the United States District Court, to compel Shelton to appear as a witness, under Section 11(2) of the Act. However, that would have necessitated adjourning the hearing until district court proceedings could be completed, in the process adding one more case to the existing dockets which burden district courts. In the end, to no meaningful purpose.

"Obviously, the best method of authentication would be for each employee who signed a card to personally authenticate his own signature." *Ona Corp. v. NLRB,* supra, 729 F.2d at fn. 13. Yet, as pointed out above, personal authentication is not required to conclude that a signature on an authorization card is authentic. *Amber Delivery Service, Inc.,* supra. Authentication can be made by someone other than a card signer. And that approach is consistent with the more general authentication approach of Fed.R.Evid. Rule 901(b)(1) which allows authentication to be made through, "Testimony that a matter is what it is claimed to be." Among the "broad spectrum" of authentication methods contemplated by that rule is "testimony of a witness who was present at the signing of a document," according to the Advisory Committee's Note for that rule. 56 F.R.D. 183, 332.

Such testimony is present here. Chiarito testified that, following the Georgio's meeting, he had given one of the five blank authorization cards, received from Avalos, to Christopher Shelton, while the two men were in Respondent's parts department. After explaining what had taken place during that meeting, testified Chiarito, he asked "if [Shelton] was willing to be represented, to fill out the card and return it to me." "He filled out the card in front of me, signed it and gave it back," Chiarito testified. Chiarito identified the authorization card shown to him during the hearing as being the card which he had seen Shelton fill out and return. With respect to that card, therefore, there is "testimony by a witness who was present at the signing of" it.

As pointed out above, Respondent contends that Chiarito was not a credible witness and, accordingly, that no reliance should be accorded to his testimony. Although there were occasions when it appeared, as he testified, that Chiarito was embellishing certain aspects of his accounts, his testimony about seeing Shelton sign a card was not one of those aspects. As described above in this subsection, almost every facet of Chiarito's testimony about his union activities is corroborated by the testimony of other witnesses. Most specifically, the only two employees who signed cards after the Georgio's meeting and who were questioned about the circumstances under which those cards had been signed, Katzberger and Ciambrone, essentially corroborated Chiarito's descriptions of how he had received signed cards from them. Moreover, their accounts of post-August 24 solicitations of their signatures by Chiarito are "similar in nature" to Chiarito's description of his solicitation of Shelton's signature on a card. To that extent, their accounts "support a finding that [Shelton's signed card] is what its proponent

claims," *Alexander's Restaurant & Lounge*, 228 NLRB 165, 168 fn. 6 (1977), enfd. 586 F.2d 1300 (9th Cir. 1978), and provide independent objective support for Chiarito's testimony about having solicited and obtained Shelton's signature on the authorization card produced at hearing and identified by Chiarito.

Of course, that testimony by Chiarito, if untrue, could have been controverted by Shelton, had he appeared as a witness. That seems to be a result that the Union had hoped to prevent by the subpoena which Respondent represents had been served by the Union upon Shelton. That is, the fact that the Union did seek Shelton's appearance as a witness is, at least, some indication that the Union anticipated that Shelton would corroborate the testimony by Chiarito about the card's signing—otherwise, obviously, it would not likely have served a subpoena on Shelton.

On the other hand, Shelton was employed by Respondent during the hearing. So far as the record discloses, there is no basis for concluding that he was not equally available, as a witness, to Respondent. Certainly, as discussed in subsection G in connection with Patt, it cannot be said that Respondent was either unfamiliar with the procedure for interviewing, or unwilling to interview, employees prior to the hearing. Consequently, so far as the record shows, Christopher Shelton was equally available to all parties and, accordingly, no adverse inference can be drawn from the General Counsel's, or Union's, failure to call him to authenticate the authorization card which bears his signature, and to corroborate Chiarito's account of how that card came to be signed. See discussion, *Bufco Corp. v. NLRB*, 147 F.3d 964, 971 (D.C. Cir. 1998).

Chiarito appeared to be testifying candidly about his solicitation of Shelton's signature on an authorization card and, also, about the fact that Shelton had signed the card produced during the hearing. His testimony is consistent not only with his corroborated descriptions of his general activities on behalf of the Union but, as well, with his descriptions of how he had solicited cards following the August 24 meeting at Georgio's Banquet Hall. I credit the testimony by Chiarito about the solicitation of Shelton's signature on an authorization card and, further, conclude that the card is a valid designation of the Union as Shelton's bargaining representative—a designation which, so far as the evidence discloses, Shelton never made an effort to disavow after having signed the card.

There is one other aspect of Chiarito's post-Georgio's meeting solicitation of signatures on those five cards which requires some discussion. After obtaining the fifth signature, Chiarito testified that he had contacted Avalos, informing the latter about those signed cards. "He told me that that was fine, that he would get them from me at a later time," testified Chiarito. It appears that the five signed cards were not actually given to Avalos until immediately after both the Union and Machinists had requested recognition from Respondent on August 30, as described in subsection D below. Yet, the fact that Avalos, nor any other official of the Union, did not actually come into possession of those five cards, before requesting recognition, does not somehow preclude them from being counted when calculating the Union's support at the time of its request for recognition.

In the first place, at the time that the Union requested recognition, Avalos was aware that Chiarito possessed the five cards. By then, the five employees had each signed a card and submitted it to the person—Chiarito—who had solicited their signatures. In effect, Avalos had authorized Chiarito to hold onto them until he (Avalos) was able to perform the ministerial act of picking them up. Surely, accomplishment of that ministerial act was not essential for the cards to be counted in support of the Union's recognition request.

Beyond that, secondly, in having given the five blank cards to Chiarito the Union effectively had designated him as a "special agent[ ] of the Union for the limited purpose of" soliciting signatures on those cards. *Salem Village I*, 288 NLRB 563, 564 (1988). Not only does that mean that such a special agency "vests the solicitor[ ] with apparent authority to make statements related to the subject matter of the cards," *University Towers*, 285 NLRB 199, 199 (1987), but, concomitantly, it means that once the signed cards came into possession of the Union's "special agent" they came, as well, into the possession of the Union, just as would have been the fact had they been given to Avalos or some other officer of the Union. Therefore, by the time that it requested recognition by Respondent on August 30, the Union had been validly designated the collective-bargaining representative by 12 porters, detailers and parts department employees and drivers.

Docketed on August 26 was the Union's representation petition, in what was denominated Case 13–RC–20202, seeking an election among employees in a bargaining unit of, "ALL REGULAR AND PART TIME UTILITY EMPLOYEES, GARAGE AND STOCKROOM ATTENDANTS, DRIVERS, COUNTERPERSONS AT THE FACILITY LOCATED AT 4900 S. PULASKI." Seemingly, it would have been no problem for the General Counsel or the Union to adduce evidence of when precisely Respondent had received a copy of that petition. Neither, however, presented any evidence to contradict Taylor's remark to employees that Respondent had not received a copy of the petition until late during the afternoon of Friday, August 27, as mentioned in the succeeding subsection. As also will be seen in that subsection, that date created some problem not only for two witnesses, but for all counsel, as well.

C. Unlawful Preelection Statements Attributed to Maus and Taylor

Three employees testified that, in the wake of the Georgio's meeting, they had been interrogated and threatened by Service Manager Maus. Thus, porter Dove and detailer Pollastrini testified that, after they had clocked out and were leaving work for the day, Maus had approached them. Both testified that Maus had asked who had started the union and, then, had said that when he found out, he would fire that person.

For example, during direct examination Dove testified that Maus "said, who started the Union. If he found out who started it, he was going to, f—king, fire him." Asked to repeat that question during cross-examination, Dove testified, "he said what about the Union coming in," and, "he wanted to know who stated the Union": "Who started the Union?" And asked, also, to repeat the threat, Dove twice testified that Maus had said "when he found out who did it, he was going to, f--king, fire him." The fact that Dove provided essentially the same descriptions of what Maus had said, with only minimal variance in words spoken, is a factor which tends to reinforce the reliability of his description of what Maus had said.

As had Dove, Pollastrini testified during direct examination that Maus "wanted to know who was trying to start this union," and "said when he found out he would f—king fire us. Yeah, that he would fire us." Asked during cross-examination to repeat what Maus had said, Pollastrini initially testified, "He wanted to know who started the Union," then testified, "Well, actually he said he wanted to know who started this whole mess. When he found out he would f—king fire us." Not only was Pollastrini's testimony about the questioning and threat essentially consistent during direct and cross-examinations, but it is consistent with the above-described account given by Dove regarding what Maus had said.

It hardly can be disputed that Section 8(a)(1) of the Act is violated whenever an employer's admitted statutory supervisor and agent makes statements to employees such as the above-described statements attributed to Service Manager Maus by Dove and Pollastrini. A threat to discharge employees who engage in union activity—who "start" a union's organizing campaign—quite obviously interferes with, restrains and coerces employees in their exercise of their statutory rights to self-organization and to join and assist labor organizations. See, e.g., *House Calls, Inc.*, 304 NLRB 311, 311 (1991) (Lelia Corcoran's statement to White). Indeed, threats of employment loss for engaging in union activity are categorized as "hallmark" violations of the Act. See, e.g., *Overnite Transportation Co.*, 329 NLRB 990 (1999); *NLRB v. Windsor Industries,* 730 F.2d 860, 865 (2d Cir. 1984).

Likewise, interrogation about union activities is unlawful whenever it can be concluded to have been coercive. While the two employees had each signed an authorization card at Georgio's, there is no evidence that either one had engaged in any other activity on behalf of the Union, much less done so openly. From Dove's and Pollastrini's accounts, Maus had initiated the above-described conversation and his question was put to them abruptly, unaccompanied by any explanation for asking it. To be sure, the conversation occurred on the facility's floor, as opposed to in an office, and Maus is not the highest-ranking official at the Orland Park facility. Nonetheless, he is that facility's service manager and an admitted statutory supervisor. In fact, he is a supervisor who is in the direct chain of supervision for porters and detailers, the respective job classifications of Dove and Pollastrini. Consequently, those two employees could fairly assume that Maus was in a position to affect, for good or ill, their future employment at Respondent. Beyond that, given his supervisory position, employees could fairly conclude that Maus would be aware of Respondent's overall attitude toward unions

aware of Respondent's overall attitude toward unions and that there was likely some reason endorsed by higher management for his question and threat. See, e.g., *Gray Line of the Black Hills*, 321 NLRB 778, 792 (1996).

Were Dove and Pollastrini's account of Maus' remarks to be credited, it would be difficult to conclude that the latter's question had been posed in some sort of friendly setting. From their description, the two employees were not assured that they did not need to answer Maus' question about who was starting the, in effect, Union's organizing campaign. Nor were they assured that no reprisals, based upon their answers, would be directed against them or anyone whom they identified as having initiated that campaign. To the contrary, Maus expressed the intention to fire whoever was discovered to have started it. Though neither Dove nor Pollastrini had initiated the Union's campaign, they were involved in it, as a result of having signed the Union's authorization cards. Employees in such a situation would naturally become apprehensive about disclosing any aspect of their union activity, no matter how minimal, for fear that their employer would extend its threat of reprisal beyond only the employee(s) who had initiated a union's campaign. In these circumstances, based upon Dove's and Pollastrini's descriptions, the question put to them by Maus was coercive and did inherently interfere with, restrain and coerce employees in the exercise of right guaranteed them by Section 7 of the Act.

During their examinations, three possible problems emerged in connection with the reliability of their accounts. First, there was conflict between their accounts concerning their responses to Maus' question about who had started the Union's organizing effort. Pollastrini testified that he had replied to that question, "I don't know," or, "I didn't know"; Dove testified, "No, I didn't hear [Pollastrini] say nothing back" to Maus, but instead that Pollastrini "just shrugged his shoulders, I guess" in response to that question. On the other hand, while Dove testified that he had replied, "I don't know" to Maus' question, when asked if Dove had replied to that question, Pollastrini answered, "[N]o." To be sure, the responses to the asserted question by Maus are a part of the overall transaction which each of those employees was describing. Nonetheless, the disparity between them regarding that aspect should not be magnified out of proportion, to the point where that disparity can be characterized as of such significance that it obliterates entirely the two employees' testimony about what Maus had said to them.

From their descriptions, Dove and Pollastrini had been caught completely offguard when Maus approached and questioned them. That is, there is no basis for concluding that either employee could have fairly anticipated that Maus would question them. Moreover, given what they described Maus as having said, it would be more natural for an employee to become focused upon what their supervisor was saying and less concerned with what the other employee might be saying. Responses by the other employee in that context can fairly be characterized as more in the nature of detail. And "confusion as to details" is not the type of factor which can be elevated to the level of rendering a witness's account totally unreliable. See, e.g., *NLRB v. Longshoremen's ILWU*, 283 F.2d 558, 563 (9th Cir. 1960); *Doral Building Services*, 273 NLRB 454 fn. 3 (1984). Instead, that type of disparity can fairly be characterized as showing no more than "the fallibility of memory," *NLRB v. American Art Industries,* 415 F.2d 1223, 1227 (5th Cir. 1969), cert. denied 397 U.S. 990 (1970), concerning a collateral aspect of a conversation about which two employees gave essentially corroborative descriptions of what had been said by their supervisor.

Second, as a facial matter, it might appear that there was a disparity between the two employees' descriptions of where their encounter with Maus had occurred. "By the detail shop in the back of where the mechanics are by the detail shop itself," Pollastrini testified it had occurred. "By the wash bays," Dove placed his and Pollastrini's encounter with Maus. Yet, the possibility of any disparity seems no more than a matter of differing points of reference, rather than one of conflicting descriptions about location.

Undisputed was Chiarito's description of "three wash bays," located "[i]n the back half of the shop" where porters work, "and there were some detail bays if we ever had to vacuum a car." Accordingly, the "detail shop" and "the wash bays" would seem to be in the same general area in back of Respondent's Orland Park facility. The fact that Pollastrini utilized the one while Dove utilized the other, as points of reference for their encounter with Maus, simply does not necessarily show that "the truth of one implies the falsity of the other." U.S. *v. Krilich*, 159 F.2d 1020, 1025–1026 (7th Cir. 1998). Based upon the record, instead, their accounts are akin to one person describing an encounter between third base and home plate as having occurred on the base path from third base, while another person describes it as occurring on the base path to home plate.

The most meaningful seeming discrepancy between Dove's and Pollastrini's description was created by the nature of initial questioning of the two employees which, then, was latched onto by all counsel, in the process ignoring what one of those employee-witnesses said when testifying spontaneously, rather than being led. As pointed out at the end of subsection B above, the only evidence of when Respondent actually received a copy of the petition in Case 13–RC–20202 was Taylor's August 30 statement to employees, discussed below, that it had been late during the afternoon of Friday, August 27. In an apparent effort to connect Maus' statements to Dove and Pollastrini to Respondent's receipt of that petition, cocounsel for the General Counsel suggested the date August 27 when opening interrogation of each of those two employee-witnesses. Thus, questioning of Pollastrini commenced, "I'm going to direct your attention now to August 27th, 1999," while that of Dove began, inter alia, "if I could direct your attention to August 27th."

As mentioned above, all other counsel then adopted that suggested date. In the process, Respondent presented timecards for Pollastrini and Dove for the workweek of August 23 through 27 and focused on the fact that, for Friday, August 27, Pollastrini is shown as having clocked out at 5:05 p.m., while Dove is shown as having clocked out at 6:15 p.m. As pointed out above, the two employees testified that they had been together, leaving work after having clocked out, when they were approached by Maus. Attempting to regain the high ground during rebuttal, the General Counsel recalled both employees, each of whom testified that they had been driving to and from work during late August together. In fact, Respondent's timecard markings did not preclude the possibility that Pollastrini had waited at Respondent on August 27 until Dove had clocked out an hour and ten minutes later. Nevertheless, in the process of testifying during rebuttal, the two employees gave conflicting testimony about who had been driving on Friday, August 27: each one claimed to have been doing the driving, with the other being a passenger.

Suggesting a date, like other suggested matters, poses a danger "that the witness may acquiesce in a false suggestion," *1 McCormick on Evidence*, 5th ed. 6, page 19 (1999), given the fact that witnesses are not ordinarily disposed to challenge counsel's factual suggestions, especially those made during interrogation by counsel calling them. Still, Pollastrini did later give testimony which should have alerted all counsel that August 27 may not have been the date of Maus' above-described interrogation and threat. "I'm bad at numbers, days," he testified. When not led by a suggested date, Pollastrini placed Maus' remarks as having been, "I think it was the next day" after the Georgio's meeting. "I believe so," he testified at another point, that it been the day after that meeting. That "next day" would have been August 25, of course. All counsel simply ignored that testimony and continued trying to squeeze in the Maus encounter on Friday, August 27.

Significantly, examination of the above-mentioned timecards, introduced by Respondent, shows that on August 25 Pollastrini and Dove had each clocked out at 16.25 or 4:25 p.m. Indeed, on the following day, August 26, those timecards show that both had clocked out at 16.15 or 4:15 p.m. Thus, all else aside, Maus could have interrogated and threatened them on either of those days, after they had clocked out and were leaving work. Of course, a conclusion that the interrogation and threat had occurred on either of those days deprives the General Counsel of direct evidence—"evidence, which if believed, proves existence of fact in issue without inference or presumption." (Citation omitted.) *Rollins v. TechSouth, Inc.*, 883 F.2d 1525, 1528 fn. 6 (11th Cir. 1987)—as to how Maus could have learned about the Union's campaign, from Respondent's conceded receipt of the petition by the afternoon of August 27, thereby perhaps weakening objective support for the accounts of Pollastrini and Dove, as the General Counsel appears to have assessed the situation.

Of course, Maus's remarks to Pollastrini and Dove are direct evidence that he knew about the organizing campaign. See, e.g., *General Trailer, Inc.*, 330 NLRB No. 150, slip op. at fn. 2 (2000). As pointed out in subsection B above, the record suggests possibilities, other that

receipt of the petition, for Maus to have learned before August 27 that an organizing campaign had begun. Employees were talking about it, apparently quite freely and openly, prior to the Georgio's meeting. There is no evidence suggesting that such free and open conversation had somehow ceased in the immediate wake of that meeting. To the contrary, Chiarito had been soliciting signatures on the five blank cards which he had obtained from Avalos. In consequence, there appears to have been ample opportunity for Maus, or some other official of Respondent, to have overheard some of that seemingly ongoing conversation, even before Respondent received a copy of the representation petition.

It is accurate that a third employee, Chiarito, did testify to similar statements by Maus and, in that regard, did place Maus's remarks on August 27, without aid of counsel. Thus, Chiarito testified that he had been asked by Maus why "we were starting," or "why we had started a union," and, when he denied knowing anything about it, had been told that when Maus found out who was doing so, "they were going to get fired," or "they were going to fire them." "I think it was August 27th. It was the Friday before we walked out of the dealership," on August 30, Chiarito testified when Maus had made those statements. Still, it can hardly be concluded that there is some sort of implication of falsity between interrogation and a discharge threat directed to two employees on one day and a similar interrogation and threat directed to a third employee on a different day. In any event, Respondent did not pursue such an avenue regarding Chiarito's description. It pursued two others, instead.

First, in a prehearing affidavit Chiarito had placed those statements by Maus as having been made "on or about Friday, August 20th, 1999," one week earlier than he placed them when testifying. Chiarito never did explain the reason for that date-disparity, between the one in his affidavit and that advanced when testifying. On the other hand, there is no evidence regarding what had transpired when the affidavit was taken—the degree to which effort was made by the Board Agent to pin down the exact date of Maus's interrogation of and threat to Chiarito. In fact, as discussed above, it is not inconceivable that Maus had heard some of the ongoing shop talk about the Union and its scheduled Georgio's meeting before that meeting had occurred. Thus, as an objective matter, it is as plausible that Maus had spoken to Chiarito before that meeting as afterward. In any event, at best in the circumstances here, the date-disparity rises to no level greater than that of "confusion as to details," *NLRB v. Longshoremen's,* supra, which fails to inherently discredit Chiarito's description of what had been said to him by Maus.

Second, sometimes, but not always, when testifying Chiarito prefaced Maus' threat with the adjective "f—king,"[7] as Pollastrini and Dove testified that Maus had done when making that same threat to them. But, that adjective appears nowhere in Chiarito's prehearing affidavit account of what had been said to him by Maus. Chiarito explained, "I really didn't think that I had to put that in" the affidavit. That is not an uncommon belief of witnesses, despite the relative frequency with which that word is, unfortunately, all too often utilized in day-to-day exchanges.

On the other hand, Chiarito had been allowed to remain during the hearing, as the Union's Fed.R.Evid. Rule 615(3) designated representative, under the sequestration order. Consequently, he had heard the earlier descriptions of Pollastrini and Dove, in which the adjective was included in the remarks which each attributed to Maus. As pointed out in subsection B above, there were points in his testimony when Chiarito appeared to be embellishing his testimony—attempting to put his thumb on the scale. This could well be one example of such conduct: having heard two other witnesses attribute use of that adjective to Maus, Chiarito decided to add it to his own account, thereby adding emphasis to what Maus was threatening. Whether that is or is not a correct conclusion, addition of that adjective would not inherently obliterate the reliability of Chiarito's account of Maus' threat.

Use of that adjective does not somehow convert a benign threat into a malignant one: the Act is violated whether an employer's agent threatens to "f—king fire" or only "fire" a union activist. The threat described by Chiarito, even without that adjective, is essentially identical to the threat which Pollastrini and Dove each attributed to Maus. Obviously, in view of Chiarito's affidavit account, Chiarito had attributed a discharge threat to Maus even before having heard it described by Pollastrini and Dove. The fact that all three employees described the essentially same threat by Maus, two on one occasion and the third on a separate occasion, is some objective evidence tending to support a conclusion that, in fact, Maus had uttered such a threat, as well as having asked the same question about who was starting the Union.

With respect to that question, it is accurate that Chiarito had been the leading activist on behalf of the Union. Yet, that fact cannot nullify the coerciveness of the interrogation described by Chiarito. After all, there is no evidence that, when he had questioned Chiarito, Maus had been aware that Chiarito was the Union's leading activist at Respondent. Moreover, as with the descriptions of the question put to Pollastrini and Dove, there is no evidence that Maus had explained to Chiarito the reason for asking such a question, nor is there evidence that Maus had assured Chiarito that no reprisals would result from an honest answer to that question. To the contrary, Maus had threatened that discharge would be imposed upon whomever was identified. While Maus appears not to have been aware of who that employee was, Chiarito certainly knew that he was the one who had initiated talk about unionizing among Respondent's porters, detailers, parts department employees and drivers. Not surprisingly, he falsely told Maus that he did not know who that was, a further factor tending to indicate the coerciveness of Maus's question, *NLRB v. Joy Recovery Technology Corp.*, 134 F.3d 1307, 1313 (7th Cir. 1998), though, of course, the overall test of unlawfulness is an objective one. See, e.g., *Southdown Care Center*, 308 NLRB 225, 227 (1992).

Should the testimony of Pollastrini, Dove, and Chiarito, about what Maus had said, be credited? In the final analysis, those accounts were never effectively denied by Maus. Called as Respondent's witness, he denied only having any meetings with any employees in the shop at the end of the day on August 27, denied having any conversations with Pollastrini and the end of work on August 27, and denied having any conversation with Dove at the end of work on August 27. He did generally deny having discussed any union matters with any of Respondent's employees. However, at no point did he deny with particularity having asked Pollastrini, Dove, or Chiarito who had started, or was starting, the Union's organizing effort. Nor did he ever deny with particularity having threatened to Pollastrini, Dove, or Chiarito that whoever was starting a union would be discharged.

The doctrine that "production of weak evidence when strong is available can only lead to the conclusion that the strong is adverse," *Interstate Circuit, Inc. v. U.S.*, 306 U.S. 208, 226 (1973), is ordinarily applied to comparative types of evidence—for example, presenting only testimony when documentary evidence is available and in control of a proponent of that testimony, but is never produced. Even so, that doctrine also has some application to comparative denials. Specifically, it is settled that general or "blanket" denials by witnesses are insufficient to refute specific and detailed testimony advanced by the opposing sides' witnesses. See, e.g., *Williamson Memorial Hospital*, 284 NLRB 37, 39 (1987); *Emerson Electric Co. v. NLRB*, 649 F.2d 589, 592 (8th Cir. 1981); *Mastercraft Casket Co. v. NLRB*, 881 F.2d 542 (8th Cir. 1989).

Pollastrini, Dove, and Chiarito each gave detailed and specific descriptions about what Maus had said. Those detailed and specific descriptions are not effectively refuted—put in issue—by denials which are general. Nor are they put in issue because specific but attributed to a date other than the one identified by unaided testimony, as the date on which they had been made. That is, a denial confined to August 27 hardly suffices to effectively deny detailed and specific descriptions of an incident which occurred on August 25 or 26. Independent of those considerations, it appeared that the three employees were each testifying truthfully about the remarks made by Maus. No objective evidence detracts from their accounts. I credit their testimony about what Maus had said. In consequence, a preponderance of the credible evidence shows that Maus had coercively interrogated employees and did threaten discharge of whomever was discovered by Respondent to have started the Union's campaign. Inasmuch as Maus is an admitted supervisor and agent of Respondent, those statements to employees had a natural tendency to interfere with, restrain and coerce employees in the exercise of statutory rights, thereby violating Section 8(a)(1) of the Act.

As mentioned in subsection A above, and as discussed further in subsection D below, at midmorning on Monday, August 30 officials of the Union and of Machinists came to Respondent's facility. Each union requested recognition as the representative of employees whom it sought to represent. Before that happened that day, Vice President and General Manager Taylor met with Respondent's employees and discussed having received a representation

[7] The word "fired" as described by Chiarito, as well as by Pollastrini and Dove, is used as the object of the verb; thus, "f—king" is an adjective, not an adverb.

petition on the preceding Friday. Based upon an amendment to the consolidated complaint made during the hearing, it is alleged that, during his remarks to those employees, Taylor had threatened that it would be futile for them to elect to become represented by the Union. Although there is some disparity between his account of what he had said and employee descriptions of what Taylor had said, there is really no meaningful dispute that Taylor had said that receipt of the petition had ended Respondent's consideration of benefits changes for employees.

Thus, Taylor testified that he had said only "that I had, was in the process of changing the company benefit plan," but, "unfortunately I had received notification late Friday afternoon that they had petitioned the Union for representation. And at that point in time I could not make any changes to their benefit package." "No I did not" say anything more during that meeting with employees, testified Taylor, "other than just to say, you know, you need to get back to work." Taylor did not deny specifically Dove's testimony that he (Taylor) had said, "[b]ecause he heard about the Union," that "there's nothing he could do" or "there's nothing he could do for us" concerning "raises and giving us more, better benefits," or "raises and benefits" and "lower insurance." Nor did Taylor deny with particularity Chiarito's testimony that Taylor had said "he would not be able to do anything for us regarding pay or benefits or lower insurance," or, "That he would not be able to give us any, any type of pay increase or benefits. Or wouldn't be able to lower the insurance rates." Analytically, of course, there is no meaningful difference between an employer telling employees that it "could not make any changes to their benefit package," and telling employees more specifically that raises, better benefits and lower insurance rates, though planned, could not be changed because a representation petition had been filed.

The General Counsel alleges that Taylor's remark had constituted a threat of futility, as stated above. To be sure, it does violate the Act for an employer to tell employees that "a union would do [them] no good," *NLRB v. McCormick Concrete Co.*, 371 F.2d 149, 152 (4th Cir. 1967), because, in effect, they are "already receiv[ing] in wages or benefits all they could expect a union to obtain for them," *Pacific Telephone Co.*, 256 NLRB 449, 449–450 (1981). Employees, "no more than the generality of maniknd [sic] are inclined to engage in futile acts," and, accordingly, "There is no more effective way to dissuade employees from voting for a collective-bargaining representative than to tell them that their votes for such a representative will avail them nothing." *Trane Co. (Clarksville Mfg. Div.)*, 137 NLRB 1506, 1510 (1962). Such statements naturally "discourag[e] the organizational efforts of employees," *Madison Industries,* 290 NLRB 1226, 1230 (1988), thereby interfering with and restraining employees in the exercise of their statutory right to choose to become represented by a bargaining agent. See, *NLRB v. Varo, Inc.*, 425 F.2d 293, 299 (5th Cir.1970); *NLRB v. Sky Wolf Sales*, 470 F.2d 827, 831 (9th Cir. 1972).

The problem for the General Counsel's amended allegation is that Taylor's remarks did not constitute a threat that employees would gain nothing be electing to become represented. Instead, they were a flat statement that, while he had been "in the process of changing" their benefit plan, he would not be able to implement any such changes because the petition which the Union had filed, a copy of which he had received. That is a quite different statement than a futility one. Nonetheless, that difference does not preclude evaluating whether or not Taylor's statement violated Section 8(a)(1) of the Act.

The amended allegation put Respondent on notice that Taylor's statements during the August 30 meeting with employees are alleged to have violated the Act. The factual issue of what Taylor had said was fully litigated: employees were questioned about Taylor's statements, both during direct and cross examinations; Taylor was asked for his version of what he had said to the employees that morning. Obviously, Respondent understood what was at issue. Therefore, evaluation of whether his statements violated the Act, albeit in a manner different than that alleged by the complaint's amendment, is appropriately undertaken and warranted. See, most recently, discussion, *McKenzie Engineering Co. v. NLRB*, supra, 182 F.3d at 626–627.

"The general rule is that, in deciding whether to grant benefits while a representation election is pending, an employer should act as if no union were in the picture." *Kauai Coconut Beach Resort*, 317 NLRB 996, 997 (1995). Thus, where an employer is pursuing a benefits improvement "process planned and set into motion" upon learning of a union's organizing campaign, that employer is obliged to continue pursuing that process, as if no union were in the picture; doing so does not violate the Act. *Nissan Motor Corp. in U.S.A.*, 263 NLRB 635, 639–640 (1980). If, instead, that employer abruptly announces to employees that it will cease doing so because a petition has been filed, that employer has effectively told employees that they going to suffer a detriment, for no reason other than their union activity leading to the filing of the petition, and places the onus on the union for employees' loss of prospective benefits' changes. See, e.g., *NLRB v. West Coast Casket Co.*, 205 F.2d 902, 905 (9th Cir. 1953); *Plasticrafts, Inc. v. NLRB*, 586 F.2d 185, 186 (10th Cir. 1978).

To be sure, the Act does allow employers to announce that contemplated wage and benefits increases are being postponed during an organizing campaign to avoid an appearance of unlawful interference with that campaign. See, e.g., *Atlantic Forest Products*, 282 NLRB 855, 858 (1987). To fit a particular situation within that allowance, however, the employer must explicitly inform employees that a planned pay or benefit increase, or process leading to such changes, is being deferred only to avoid the appearance of unlawfully influencing employee-choice and, furthermore, "that they would receive [the] increase . . . once the representational matter was settled." (Citation omitted.) *United Methodist Home of New Jersey*, 314 NLRB 687, 688 (1994). So far as the evidence of what he said shows, Taylor satisfied neither of these conditions. He simply told the assembled employees that he could not make any changes at that point, though he had been in the process of planning to do so, and for no reason other than receipt of a copy of the representation petition. There is no evidence that he said anything about avoiding an appearance of impropriety. There is no evidence that he said anything about resuming consideration of benefits changes once the representation issue was resolved. Inasmuch as the petition resulted from employees' statutorily-protected activities, Taylor's statement constituted an outright statement of retaliation against employees for having engaged in such activity, thereby naturally tending to interfere with, restrain and coerce them in the exercise of that statutory activity, in violation of Section 8(a)(1) of the Act.

D. August 30 Requests for Recognition and Commencement of the Strike

Machinists' and the Union's officials planned to approach Respondent at the same time to make recognition requests. It was their intention, formulated before making those requests, to commence strike action if Respondent refused to grant recognition. For example, the Union's director of organizing, William P. Logan, testified that, prior to August 30, there had been discussion of that course with employees of Respondent and that approval for a strike, in the event of a refusal to recognize, had been sought and obtained from the Union's executive board. Picket signs and other equipment were marshaled and brought to Respondent's location when the unions' officials arrived there on August 30.

A number of representatives from both Machinists and the Union entered Respondent's showroom as a group. For example, present for Machinists were Organizer Mullin and several other business representatives. Present for the Union were Director of Organizing Logan and Business Agent Avalos. Mullin, for Machinists, and Avalos, for the Union, each informed Taylor that they represented employees, in each's respective employee-group, and requested recognition. In addition, Avalos offered a letter, with an attached "*RECOGNITION AGREEMENT*," in which the Union "formally ma[de] a request for recognition" by Respondent, as the representative of "all Utility Employees, Garage Attendants, Parts Department Employees, Stockroom Apprentices and Drivers, excluding all office clerical and professional employees, guards and supervisors as defined by the Act as Amended." Taylor declined to accept the letter and declined to grant recognition to either union, directing that the union representatives contact Respondent's attorney and asking that all of them leave.

The union representatives complied with Taylor's request. They left the showroom. But, they went to Respondent's service department where they announced that Respondent had refused to recognize either union and called upon the employees to begin a strike. Apparently it was during this sequence of events that Chiarito handed to Avalos the five post-August 24 signed authorization cards.

Before turning to description of the strike, all parties stipulated that an appropriate collective-bargaining unit under the Act is: All full-time and regular part-time porters, detailers, hikers, parts department employees, and drivers employed by Respondent at its facility currently located at 8430 West 159th Street, Orland Park, Illinois; excluding all salespersons, mechanics, technicians, office clerical employees, service writers, dispatchers, professional employees, guards and supervisors as defined in the Act. As concluded in subsection B above, as of August 30 the Union had received 12 valid signed authorization cards from employees in

that stipulated unit. Respondent does not contend that any of the card signers had not been included in that unit. Consequently, as of August 30 the Union possessed a number of valid signed cards which would confer majority status in an appropriate bargaining unit of no more than 23 employees.

With regard to that, Respondent argues that, as of August 30, there had been 25 full-time and regular part-time employees in the stipulated unit's job classifications. To support that argument, Respondent relies primarily upon Taylor's generalized assertion to that effect and, in addition, an "employee census report" (R. Exh. 38) which Taylor had prepared. That census report lists all of the employees whom Respondent regarded as still employed by it at the time of the list's preparation. Interestingly, when Taylor was interrogated respecting the exact date of the census report's preparation, he equivocated.

"I don't have a date on this one [the census report]. I'm trying to think. I would say I created this, probably, in the month of December, I'm going to say," he testified initially. Now, Taylor appeared to be a person of above-average intelligence and professional accomplishment. The hearing commenced during the first full week of January 2000, the month which immediately followed December 1999. It seems unusual for a witness of Taylor's apparent abilities not to be able to say with greater certainty whether or not he had created the census report during December and, more precisely, on which approximate date during that month he had prepared it. After all, the hearing commenced less than 35 days from the beginning of December. Still, Taylor persisted in attempting to appear uncertain as to when, even approximately, during December he had prepared the census report: "It was probably the end of December, I would say. Again, I don't know how that normally does it and why it [the census report] doesn't have it [date] on there. I don't know."

In fact, as discussed further below, two other exhibits prepared by Respondent further call into question the reliability of Taylor's census report. One is an "08/01/99 Organization Chart" (GC Exh. 15) which Taylor also had prepared. The other exhibit is Respondent's payroll records for 1998 and 1999, Respondent's Exhibit 40A and B, respectively.

The census report list two porters—James A. Dean[8] and Paul Sliwa—neither of whose name appears on Taylor's organization chart of August 1. Taylor attempted to explain how those omissions could have occurred by testifying, "This is something I made out myself to try to just keep some sort of track of the reports." He continued, "It's not kept up on a current basis. It's whenever I get the opportunity to do it. It was, I think, designed just to show who's who at the zoo, for a better description." Not only was that explanation not advanced convincingly, but as an objective matter it is suspect.

According to Taylor's census report—which omits Chiarito's name because he had been fired at the end of August—James A. Dean and Sliwa, if still employed on August 1, would have been Respondent's two most-senior porters. Dean's hire date was April 7, 1997; Sliwa's hire date had been August 10, 1998. Given that the organization chart lists several porters hired after Dean and Sliwa, it seems highly unlikely that their names would have been overlooked when Taylor prepared the chart. The fact is that their omission appears to more accurately reflect the fact that, as of August 1, Respondent no longer regarded either one as employed any longer by it. Such a conclusion is further supported by examination of the 1999 payroll records.

After having been hired on August 10, 1998, Sliwa had worked steadily for Respondent during succeeding "period ending[s]" during 1998 and into 1999. But, his name does not appear under any one after the period ending July 31. And Respondent never contended that Sliwa was working for it during the first full week of January 2000, when the hearing in the instant matter was conducted. So far as the evidence reveals, consequently, it appears that Sliwa had ceased being employed by Respondent after July 31, almost a month before the Union filed its representation petition and made its recognition request. Aside from Taylor's generalized assertion that Sliwa remained employed by Respondent as of the end of 1999 and aside, as well, from Taylor's self-serving census report, Respondent has advanced no evidence whatsoever to explain that, after July 31, Sliwa had any expectancy of return to employment with it. And, of course, he did not for the remained of 1999 and into the first week of 2000. Omission of his name from the organization chart is consistent with a conclusion that, as of August 1, Sliwa no longer was regarded by Taylor as employed by Respondent.

Those 1999 payroll records disclose that James A. Dean had performed work for Respondent during the period ending December 25, a fact which tends to support Taylor's census report, assuming it truly had been prepared during late December, and his assertion that Dean still was regarded as an employee at the time of the hearing. Yet, Respondent never explained how Dean came to work for it during that single December pay period. That is significant because, like Sliwa, Dean's name is omitted from the August 1 organization chart and, in fact, the payroll records reveal that Dean's last employment for Respondent, prior to the period ending December 25, had been the one ending July 31. It may be that, thereafter, Dean had been regarded as having been on leave with some sort of expectancy of return to employment. But, Respondent never bothered to advance that, or any other, explanation for the almost 5-month hiatus in its employment of Dean. Given the absence of any such an explanation, coupled with omission of his name from the organization chart, so far as the evidence shows Respondent had simply ceased regarding James A. Dean as one of its employees by August 1.

Another porter, Michael S. Lounsbury, is listed both on the August 1 organization chart and on the census report. Beyond that, not only do the 1999 payroll records disclose that, like James A. Dean, Lounsbury had worked during the period ending December 25, but those records also disclose that he had worked for Respondent during the period ending November 27. However, those 1999 payroll records also show that, aside from those two periods, Lounsbury had not worked for Respondent during 1999 after the period ending August 21. That is, his name is omitted from the 1999 payroll records for the period ending August 28, all four periods ending in September, all five periods ending during October, the periods ending on November 6, 13, and 20, and the periods ending December 4, 11, and 18. Again, Respondent advanced no explanation as to how Lounsbury became reemployed during the periods ending November 27 and December 25, save for possible student-status discussed below. In view of the absence of such an explanation, and given the further fact that Lounsbury's situation appears to have been no different than that of James A. Dean—merely a difference in final period ending worked during the summer, it is fair inference that had his last period ending occurred during July, rather than during August, like Sliwa and Dean, Lounsbury's name would have been omitted from the Organization Chart prepared by Taylor.

The basic eligibility rule is straightforward. To be regarded as an eligible voter in a representation election, an employee must, inter alia, be working on the election date, or be on some type of recognized leave from work. No different rule applies when calculating the number of employees in a bargaining unit when a recognition request is made: to be included employees must be working for the employer at the time of the request. Obviously, that rule precludes from inclusion employees who once had worked for the employer, but whose work had ceased, as opposed to having been "temporarily separated" with a "reasonable expectancy of being reemployed," *Lawrence Rigging, Inc.*, 202 NLRB 1094, 1095 (1973).

Aside from Taylor's census report and generalized claim that Sliwa, Dean, and Lounsbury had remained employees of Respondent throughout 1999, and were still its employees by the time of the hearing, there is not one objective fact supporting a conclusion that after they had left during the summer, each of them had been regarded as merely temporarily separated with a reasonable expectancy of again working for Respondent, as opposed to no more than a possibility of being rehired should a vacancy, or vacancies, exist when one or more of them sought to become rehired by Respondent.

Surely Respondent was in a position to produce particularized evidence which, if available, would have shown that those three summer cessations in employment were each no more than some sort of "temporary layoff" accompanied by a "reasonable expectancy of recall" to work with Respondent. *NLRB v. Apex Paper Box Co.*, 976 F.2d 733 (6th Cir. 1992). But, neither Taylor nor any other official of Respondent advanced any such explanation. Nor is there evidence of what had been said to Sliwa and James A. Dean at the end of July, nor of what had been said to Lounsbury when he left in August. In short, there is no basis for concluding that any one of those three porters had an expectancy of reemployment with Respondent after the summer, save to the extent of a possible opening arising when one or more of them sought to be rehired.

[8] Not to be confused with parts counter employee James Q. Dean whose inclusion in the unit no one appears to dispute.

In the case of Sliwa, a preponderance of the credible evidence admits of no conclusion other than that his employment with Respondent had ceased by July 31, almost a month before the Union filed its representation petition and requested recognition. I conclude that there is no basis in the evidence warranting his inclusion in the stipulated appropriate bargaining unit as of August 30. With respect to James A. Dean and Lounsbury, however, Respondent has another possible string to its bow: that they may have been students whose employment has always been irregular, but nonetheless continuing. That is an argument of the same genre as the one made with respect to hiker A. Michael Zolfo, though not because Zolfo had been a student. In effect, the argument proceeds, Dean, Lounsbury, and Zolfo had each been a part-time employee.

As set forth above, the parties stipulated that part-time employees should be included in the appropriate bargaining unit. But, not without restriction. Instead, they stipulated that only regular part-time employees, in the enumerated job classifications, would be included. That restriction is important. "The Board's responsibility is to identify a group of positions such that those serving in the unit can reasonably be expected to share a community of interest *over time*." *NLRB v. Trump Taj Mahal Associates*, 2 F.3d 35 (3d Cir. 1993). That is, "the individual's relationship to the job must be examined to determine whether the employee performs unit work with sufficient regularity to demonstrate a community of interest with remaining employees in the bargaining unit." *Pat's Blue Ribbons*, 286 NLRB 918, 918 (1987). For example, student-status, per se, does not necessarily preclude employees from being included in noneducational institution bargaining units. However, where a student works only during school year and summer breaks, it is well settled that such employment leaves that student a "casual, irregular part-time employee[ ] excluded from the unit." (Citation omitted.) *Beverly Manor Nursing Home*, 310 NLRB 538 fn. 3 (1993). Accord: *Davis Supermarkets v. NLRB*, 2 F.3d 1162 (D.C. Cir. 1993); *NLRB v. E. V. Williams Co.*, 432 F.2d 557 557–558 (4th Cir. 1970), cert. denied 401 U.S. 937 (1971).

A review of Respondent's 1998 and 1999 payroll records discloses a pattern of irregular employment by James A. Dean and by Lounsbury, consistent with that of a student, whether or not one or both them had actually been students during those years. Lounsbury started working for Respondent on May 24, 1999. As noted above, he worked during every succeeding payroll period-ending week until that ending on August 21. Not again did he work for Respondent until the period ending November 27, Thanksgiving have fallen on November 25 during 1999, and not again until the period ending December 25. Accordingly, even if Lounsbury truly had some sort of expectancy of employment after August 21—contrary to what appears to have been the fact, as discussed above—his employment pattern after August 21 lacked "sufficient regularity," *Pat's Blue Ribbons,* supra, to reasonably conclude that he would "share a community of interest *over time*," *NLRB v. Trump Taj Mahal*, supra, with Respondent's full-time and regular part-time employees. Either he ceased altogether working for Respondent by August 21 and was rehired for 1-week periods during November and December or, alternatively, he was a student working for Respondent during summer and school-year breaks. In either instance, he lacked a community of interest with unit employees as of the dates on which the Union filed its petition and requested recognition.

James A. Dean's employment pattern during 1998 and 1999 displays a similar irregularity. Although hired on April 7, 1997, Dean's name does not appear on the 1998 payroll records during any period ending date from December 27, 1997, through May 11, 1998. He did work during the periods ending on May 23, June 10 and 25, July 4 and 25, and August 10 and 15, 1998. But, his name does not appear on any payroll record for the remainder of 1998. Nor does it appear on any payroll record for January and February of 1999. He was paid for work during the period ending March 6, consistent with a possible Spring break in a school year. However, his name does not appear on any other March payroll record, nor on any of those for April and for the periods ending May 1 and 8. It does appear on the payroll records for the remaining periods ending during May, as well as for those ending during June and July. Then, as set forth above, his name does not appear on any succeeding payroll record until the one for the period ending December 25. Thus, whether he actually had ceased employment altogether with Respondent at the end of July, as concluded above appears to have been likely, or, alternatively, whether he had been a student working only during summer and other school breaks, as of the time of the Union's petition and recognition request James A. Dean did not "share a community of interest *over time*," id., with full-time and regular part-time porters, detailers, hikers, parts department employees and drivers employed by Respondent.

Even less can it be said that seemingly nonstudent Zolfo had been employed by Respondent with sufficient regularity to share such a community of interest with other unit employees. According to the census report, he had been hired on September 5, 1995. Yet, during 1998, according to the payroll records, he had worked for Respondent only during the months of July, August, and October. More importantly, during the 1999 months preceding the end of August, Zolfo had worked for Respondent only during July. He did work again for it during October, according to those records. Even taking that employment into consideration, however, that would not give rise to an employment pattern of sufficient regularity to confer a community of interest between Zolfo and other unit employees. At that, during October Zolfo earned only $127.43 for his work. In contrast, the other four hikers earned between $211.86 (Charles H. Lief) and $634.44 (Richard J. Podornik) for their work during that same period. Thus, it would appear that Zolfo's October work had been comparatively limited. Based upon these facts, I conclude that A. Michael Zolfo had been employed by Respondent too infrequently to be regarded as either a full-time or regular part-time employee.

Discussion of additional disputed employees—Dusan Buinjac, Kenneth Lash, for example—would accomplish nothing other than to prolong an already, and soon to become even more, lengthy decision. Exclusion of Sliwa, James A. Dean, Lounsbury, and Zolfo from the stipulated appropriate bargaining employees leaves a unit populated by no more than 21 employees, when the Union filed its petition and requested recognition, from whom the Union had collected 12 validly signed authorization cards. Consequently, by the time of its recognition request, the Union represented a majority of the employees in that unit.

Moving on, as pointed out above, Machinists and the Union had planned to commence strike-action should their recognition requests be rejected, as they were by Respondent. After leaving the showroom on August 30, the two unions' officials all went to the service area where they announced that recognition had been denied and called out on strike the employees for whom each sought recognition as the bargaining agent. The employees who departed were given already-prepared picket signs. As printed, those signs bore unfair labor practices legends. However, recognition stickers were placed over those legends on the signs. The General Counsel and Union concede that the strike had been economic—one for recognition—at its inception, although as described in subsection G below, soon thereafter, they contend, the strike was converted to an unfair labor practice one.

With respect to which employees responded to the unions' strikecalls, most of the technicians or mechanics left work and began picketing. It is not clear whether card signer Christopher Shelton initially joined the strike but later returned to work or, alternatively, refrained from joining the strike when it began. In either event, there is no evidence that he ever disavowed the authorization card which he had signed, nor is there any evidence that he otherwise disavowed his previously expressed desire for representation by the Union, as opposed to merely indicating that he did not agree that strike-action was warranted to accomplish recognition of the Union by Respondent.

On the other hand, detailer Bradley Turk, who had not signed an authorization card, initially joined the strike. Either later on August 30 or during the following day, however, Turk abandoned the strike and returned to work. On September 29 card-signer Brian Charles Katzberger and, as discussed further in subsection G below, card signer Patt abandoned the strike and returned to work for Respondent, without either disavowing their signed authorization cards nor the desire for representation signified by having signed those cards.

Of probably greater significance to employees whom the Union sought to represent, after 2 or 3 days technicians abandoned their strike and returned to work. That led Machinists to abandon all further efforts to become their bargaining representative, though that union's officials continued picketing on behalf of employees who continued to picket on the Union's behalf.

On the other side, once picketing began Respondent contacted the Village of Orland Park police department—at 10:05 to 10:06 a.m. on August 30, according to a police Investigation Report—and officers were dispatched to Respondent. By the time they arrived, apparently, picketing was occurring in two general areas: along 159th Street, on the sidewalk and grass parkway in front of Respondent, and, according to Director of Organizing Logan, along the 84th Street entrance to the bank on the east of Respondent's facility, "because [Respondent]

was using that entrance and until it was sealed off by the bank," after which picketed ceased at that location.

A representative of Machinists and the Union's secretary-treasurer, Terrence J. Hancock, as well as possibly other union officials, met with Orland Park Police Commander Greg Okon and possibly also with Orland Park Police Chief McCarthy. As a result of conversations with the Union's officials, a series of restrictions on picketing were made known to the picketers. First, there was to be no violence or confrontations. Second pickets were to stay off Respondent's property. Third, pursuant to Village-ordinance concerning signs, picket signs could not be stationary, but had to be mobile—whether carried by pickets or, for larger signs, placed on wheels or rollers—and had to be kept in motion. Fourth, while they could patrol across the 159th Street entrance-exit leading to and from the east side of Respondent's facility and parking lot, as described in subsection A above, the pickets could not stop in that entrance-exit, thereby blocking vehicles from entering and existing Respondent's premises. Nor were pickets to hover or stand, or place signs, on the small island or median separating entering and exiting vehicles at 159th Street.

Fifth, to preserve the sightlines of motorists driving westbound on 159th Street, as well as of motorists trying to exit onto 159th Street from Respondent's facility, no picketing or display of signs was to occur in the grass parkway near the 159th Street curb: the so-called "two foot rule from the curb," as described by Director of Organizing Logan. To ensure that that rule was observed, the police eventually placed 3-foot high, 6-foot long heavy-duty plastic saw-horse type barricades to separate the area in which picketers could patrol from that in which they could not picket. Finally, also consistent with Village-ordinance, there was to be zero tolerance for vulgarities and obscenities.

E. The Alleged Unlawful Surveillance of Picketing

Picketing was not conducted solely by employees of Respondent nor, even, by officials of the Union and Machinists. Officers and supporters of other unions joined the picketing at Respondent, with the result that at some times there may have been as many as close to 50 people on the picket line there. Picket signs were carried. Also utilized were larger signs which could only be kept in motion by placing wheels on them, to comply with ordinance-and police-requirement, as mentioned in the immediately preceding subsection. And there were two large inflatable rats which were displayed in connection with the picketing (see, e.g., GC Exh. 20; R. Exh. 34). To inflate and keep the rats inflated, a gas-powered generator was placed by the Union in the grass parkway.

Confronting that array of persons and strike-items, Respondent pursued two courses. First, it arranged to pay for round-the-clock police presence at its facility, though Respondent was not open 24 hours a day. For example, General Sales Manager Nocera agreed, during cross-examination, that Respondent had paid for 24-hour police protection and, in fact, that police officers had been present at Respondent 24 hours a day from the start of the strike to near its end during October.

Respondent's second course of action, testified Vice President and General Manager Taylor, was to authorize its counsel to seek a temporary restraining order and a permanent injunction concerning the picketing. There is no evidence whatsoever that either had been obtained or, even, actually sought. Indeed, aside from Taylor's authorization assertion, no other evidence was adduced concerning any temporary restraining order or permanent injunction in connection with the picketing.

To support doing so, however, Taylor acknowledged that he had directed photographing and videotaping of the picketing. "Well, I was concerned about the activity on the picket line. I was concerned for the safety of my customers. I was concerned about the safety of my employees. Again, I had received complaints from employees about damaged vehicles leaving the dealership," testified Taylor. He further testified, "I had concerns about the signage. I had concerns about damage that was occurring on the lot and I felt it necessary to try as best we could to keep a record of that activities [sic]."

There is no dispute about the fact that Respondent did, in fact, photograph and videotape the picketing. That was done by, at least, Service Manager Maus and by Used Car Sales Manager Miller, the latter being one of the individuals who possessed supervisory authority over Respondent's employees, as pointed out in subsection A above. Photographs were taken and videotapes made from the roof of Respondent's facility, from inside and outside of it, from Respondent's parking lot, and from the Cadillac agency and Shell station across 159th Street from Respondent's facility.

The photographing and videotaping occurred during almost the entirety of the strike. For example, porter Dove testified that he had first seen Maus taking pictures on the first day of the strike and, thereafter, "[j]ust probably about every other day," though, "[n]ot approximately, like every day, maybe." Similarly, parts driver Mataczynski testified that, "[s]ometimes in the afternoon, sometimes in the morning," he had seen Maus taking pictures "[t]wo or three times a week" until September 20. Respondent never disputed such testimony concerning the duration of its picture taking of pickets.

The General Counsel alleges that Respondent's photographing and videotaping constituted unlawful surveillance which violates Section 8(a)(1) of the Act. In fact, the Board has concluded that photographing "constitutes a form of surveillance of employees' union activities, or at least creates that impression," *Blanchard Construction Co.*, 234 NLRB 1035, 1037 (1978), and, in turn, "tends to create fear among employees of future reprisals." (Citation omitted.) *F. W. Woolworth Co.*, 310 NLRB 1197, 1197 (1993). So, too, have the United States circuit courts of appeals, *Avecor, Inc. v. NLRB*, 931 F.2d 924, 932 (D.C. Cir. 1991); *NLRB v. Colonial Haven Nursing Home*, 542 F.2d 691 (7th Cir. 1976). Although that tendency to create fear among employees—to intimidate—is measured on an objective basis, it should not be overlooked that there is evidence here of actual fear among Respondent's employees arising from being photographed and videotaped. Thus, Director of Organizing William P. Logan testified that "[p]retty much every picketer out there" had asked why their pictures were being taken and, "Can it be used to terminate me?" In fact, Taylor conceded that the photographs taken were kept by Respondent in the normal course of business, in relation to strike activity. Even so, photographing employees' statutorily-protected activity, such as picketing, does not always violate the Act.

"The Board has also held that a reasonable, objective justification for video surveillance mitigates its tendency to coerce," and that is so "even if they [surveillance cameras] happen to capture protected activities." (Citation omitted.) *National Steel & Shipbuilding Co. v. NLRB*, 156 F3d 1268, 1271 (D.C. Cir. 1998). An illustration of such a "reasonable, objective justification," which the circuit court went on to identify, is efforts to photograph or videotape instances of strike misconduct. Where strike misconduct occurs, "employees have less reason to fear that the purpose of videotaping their protected activities is to aid in later taking reprisals against them." (Citation omitted.) Id. See also *Bozzuto's, Inc.*, 277 NLRB 977 fn. 3 (1985). In the final analysis, that is the particular justification advanced by Respondent to justify its photographing and videotaping of striking employees and their supporters on the picket line. For, of course, photographic and video evidence of strike misconduct would support efforts to obtain a temporary restraining order and a permanent injunction aimed at compelling the Union and its supporters to cease and desist from strike misconduct.

According to Taylor, there were a number of instances of damage to vehicles entering and leaving Respondent's facility, as well as to new and used cars on the lot for sale. Roofing nails and ball bearings were discovered on Respondent's premises. Customers and nonstriking employees complained to him about obscene language and racial slurs, as well as about certain other conduct by pickets. Nocera testified that he had called the police about strike misconduct on numerous occasions: "Tens, 20's [sic], 30's [sic] maybe."

For example, Nocera described an incident when, as he was showing a used car to a male and a female customers, Business Agent Al Rock had taken a drink from his glass and spit the liquid on the car being shown to those customers. When the woman expressed surprise at what he had done, testified Nocera, Rock told her to "shut up, you c—t. You're just a f—king wh—e." Nocera testified that he told Rock, "I should kick your f—king ass," and Rock invited Nocera to try doing so. In addition, Nocera described an incident which he testified had occurred on September 14, as he was exiting Respondent's facility. He testified that a picket spit on his car, with some of the spittle coming through the partially-open driver's side window. Indeed, according to Nocera, his car had been spat upon virtually every day as he left Respondent's facility. As mentioned below, there are police reports about spitting having occurred, though none involving Nocera.

To support Taylor's testimony about customer- and employee complaints, Respondent introduced written statements received from persons in both groups. Thus, in an affidavit of September 24, cashier Jennifer Wiser reported that, as she had been leaving work, "picketers gathered around

my vehicle, yelling profanities and names," such as "sl—t" and "b–t–h," and that such conduct by picketers had been taking place "entering and exiting the building [sic] throughout the time period they have been there." Wiser also filed a complaint with the police on September 24, complaining that the rear passenger side of her Avenger "HAD BEEN KEYED BY ONE OF THE PICKETS."

Similarly, Administrative Assistant Debra Stege submitted an affidavit to Respondent, reporting that the right side of her Mercedes-Benz had suffered damage on October 12, when pickets had surrounded her vehicle as she was leaving work. According to the affidavit, they were shouting at her, "Baby, it's cold outside. We're real men and know how to keep you warm. I love you, please take me home with you." They blocked her view of oncoming traffic and, on the other side of her car, pressed "against my [sic] right side of the car."

Service Advisor Peter Gaich submitted a statement describing an incident when, as he was arriving for work on October 15, pickets had continued rolling one of the larger signs on wheels in front of his car, in the entrance lane to Respondent's facility, so that no matter how far to the left he attempted to maneuver, he could not gain entry through that lane. The sign eventually struck the right side of his car, the statement continues, and when he got out and confronted the picketer pushing the sign, the latter asked, "DO YOU WANT A PIECE OF ME? I'M RIGHT HERE." A verbal exchange continued between them until a police officer arrived and told the picketer that he had caused the accident, issuing a citation to him. Gaich—nor, for that matter, Wiser or Stege—never appeared as a witness. Still there is independent evidence regarding his encounter with the picket.

The incident described by Gaich appears on the excerpted videotape introduced by Respondent (R. Exh. 37), in the portion which begins at 7:34 a.m. on October 15.[9] Two police reports make reference to pickets blocking entry to Respondent during the morning of October 15, "LINKED TO POLICE SUB INCIDENT #9157949 10/15/99 PICKETER HIT VEH W/SIGN (COL)." But, incident report #9157949 is not among the police reports introduced during the hearing. In addition to the three above-described reports, two affidavits of October 15 were produced. One was by technician Michael Drez, reciting that Machinists official Jawar had "struck the windshield" of his car on September 1. The other was given by technician Brian Maratea who recited that on September 1 his car's door had been "struck and damaged by a picket sign swung by one of the picketers."

As independent evidence of customer complaints, Respondent introduced a written statement, dated September 15, of Andrea M. Johnson, on the letterhead of law offices of Leon Zelechowski. In it, Johnson states that on Saturday, September 11, as she and her husband and two children arrived at Respondent to drop off a car for servicing, a picketer wearing a "Mike" name tag began yelling at them, as they got out of their car, "scab," "f–gg–t," p—y" and "sweetie," in the process offering "to give you a kiss honey." According to the statement, as they left Respondent's building to go to their loaner vehicle, the same picketer "began yelling obscenities again." Then, as they attempted to exit onto 159th Street, another picketer was standing in the car's path, and "Mike" was standing nearby, apparently not in the exit lane. Johnson states that she asked "Mike" why he was using such language in front of children and threatening her husband, to which "Mike" replied, "f—k you, b—h," and said to her husband, "Get out of the car f–gg–t." When Johnson asked why he wanted her husband to get out of the car, the statement recites that "Mike" answered, "[S]o I can shake his hand before I kick his ass."

Her statement continues with a description of what purportedly had occurred on Monday, September 13. She came to Respondent to pick up her by-then-serviced car. According to the statement, as she arrived, "The same 'Mike' person was standing outside and saw me and motioned his hand and said, 'Come on in, I dare you.' Since I had my children with me I did not go into the lot."

Another statement dated September 15 was assertedly given by customer Tanya Love. In it, she complains about a picket named "Mike" and, as well, about "an older gentleman." According to the statement, the latter on September 10 and 11, and both of them on September 15, called her names, such as scab and loser. On September 15, the statement continues, "the older gentleman" had said "he hoped my can blewup." Another customer, Phyllis Berwin, submitted an undated letter, addressed to "Dear Commander," complaining that police officers had taken no action when pickets called her an "ugly b—h" and when "20–30 men hassled me" as she was arriving at Respondent to test drive a car.

In addition to those affidavits and statements, police reports concerning incidents occurring at Respondent, as well as recording customer and employee complaints about asserted strike misconduct, were also introduced. The two dated August 30 show only that the police had instructed Hancock and a Machinists' official to stay off Respondent's property, not to block any "public way," and to comply with all police rules. There is no indication on either of those reports that the police had believed that pickets were violating any of those rules on August 30.

According to an investigation report dated September 8, however, on September 1 "a large group of" pickets had confronted an employee's vehicle attempting to exit from Respondent's premises, forcing that vehicle to stop and screaming at the driver "insults includ[ing]—but not limited to the following in summary: WE ARE GOING TO KNOCK YOUR F—KING HEAD OFF, HEY SCAB WHY DON'T YOU COME OUT AND BE A REAL MAN, YOU P—Y WHEN I GET MY HANDS ON YOU I AM GOING TO BEAT THE F—K OUT OF YOU." The officer was blocked by Machinists' Business Agent Jawar from reaching the vehicle and, after the officer did reach it, Jawar continued pushing the officer as he was escorting the vehicle out onto 159th Street.

There is a report of September 2 reciting that a police officer had to pull a picketer from in front of a vehicle, presumably trying to block it. On September 7, according to an investigation report dated September 8, "several of the demonstrators began using abusive language and spitting on the cars" of employees leaving work. Another September 8 report states that the reporting officer "had to repeatedly keep the demonstrators from stopping traffic and entering and exiting from [Respondent]. The demonstrators repeatedly placed themselves in front [sic] of moving vehicles," compelling the officer "to repeatedly stop traffic and demonstrators from moving to prevent any injuries." Another September 8 report states that police had to direct that picketers cease using Respondent's power outlet to fuel their generator, used to inflate the rats.

On September 9 Mullin and Chiarito were arrested, the former for "standing still" and failing "to keep walking"; the latter for being too close to the 159th Street curb and "leaning out towards the street, blowing a whistle and then yelling at passing vehicles," according to the investigation report describing those incidents. However, both were released from custody at the site. Each was issued a Local Ordinance Ticket—referred to herein as an "LO"—for disorderly conduct. Two days later, on September 11, an LO was issued to Jawar for yelling the n-word at three African Americans.

Yet, thereafter there are no records of police action having been taken, as a result of picket line misconduct, until October 14 when the police warned "DAVE" about "TEAMSTERS WALKING IN FRONT OF VEHICLES," and investigated a separate incident which led to the arrest of Recording Secretary Lisner for damaging a vehicle trying to enter Respondent's premises. In the interim between September 12 and October 13, there were four complaints to the police about either ball bearings or roofing nails, such as those displayed on a September 28 portion of the excerpted videotape, being discovered on Respondent's property, in three instances accompanied by damage done to vehicles, by ball bearings Taylor opined. Furthermore, between September 12 and October 13 there are records of reports made by customers (September 13, 17, 19, and 25; and October 4) and by Respondent's employees (September 15, 16, 21 (two reports), and 23) about various types of picketer-misconduct, as well as six reports of damage to vehicles (September 21, 23, 24, and 25; and, October 11 and 12).

At first blush, the foregoing affidavits, statements, and police reports appear to evidence substantial acts of misconduct during the strike and to supply ample legitimate basis—"a reasonable, objective justification," *National Steel & Shipbuilding Co. v. NLRB,* supra—for an employer to conduct photographic surveillance of picket line activities. Yet, a closer examination of that documentary evidence raises doubt about the extent upon which it can be relied to support an assertion of strike misconduct which legitimizes such surveillance under the Act. And examination of the photographs and excerpted videotapes presented by Respondent casts even further doubt upon the asserted legitimate purpose for its having photographed and videotaped picket line activity on and after August 30.

[9] Anyone reviewing that videotape will quickly discover that the scenes portrayed do not appear in chronological order. Obviously, they were placed on that videotape by taking selected scenes from another videotape or from other videotapes, none of which were produced during the hearing, though no other party objected under the remainder rule.

First, as to customer- and employee-complaints and reports to the police, obviously it is a relatively simple matter for any person to make such reports. Their accuracy and truthfulness is another matter. Here there is evidence that some of those reports were not, in fact, accurate. For example, according to a police report dated September 15, one of Respondent's salesmen complained about inappropriate language yelled by pickets at him, his wife and two children—interestingly, conduct similar to what customer Andrea Johnson complained had happened on September 11, as described above. However, police on the scene disputed that salesman's September 15 complaint. Thus, the police reports states, "R/O ADVISED [the salesman] THA[T] THE UNION REPS HAD NOT VIOLATED ANY LAWS OR VILLAGE ORDINANC[E]," but rather that it had been the salesman's son who had been shouting at union representatives and, more generally, "INSTIGATING TROUBLE BY USING OBSCENE LANGUAGE." Indeed, the report states that it had been the salesman who had been heard using the f-word.

Similarly, a police report dated September 16 recites that an employee had reported having been called "FATF—K" by pickets. But, Detective "PRATL," who had witnessed the incident, reported, "SWEARING INCIDENT DID NOT OCCUR, NO PROFANITIES WERE USED." The employee who made that report is not identified. Yet, it is noteworthy that the term falsely reported is similar in genre to one of the names which Finance and Insurance Manager Todd Koleno claimed had been directed at him by pickets, as discussed further in subsection F below.

An investigation report dated September 21 states that a salesman reported "several 'ting' sounds-like that of a rock bouncing off a car" on the west side of Respondent's facility, though the salesman conceded that he "did not see anyone throw anything and could not positively identify" the two picketers on the west side as having thrown objects at any cars. Both picketers denied having done so. Further, although the investigating officer's report notes that "lighting condition did not allow R/O to complete a thorough investigation for possible damage to vehicles," it also states that the officer "did not observe any damage to the vehicles" on Respondent's lot and, of greater significance, "The salesman did not observe any damage to the vehicles." As pointed out above, Respondent contends that vehicles had been damaged, some by ball bearings, during the strike, and presented photographs of damaged vehicles. Yet, there is no evidence connecting any of that damage to the report made on September 21. Indeed, while nine ballbearings were discovered at the scene, so far as the record discloses, no damage to vehicles was discovered the next day, when lighting conditions were better, and no further action was pursued in connection with the salesman's report.

On September 21 a salesman reported that pickets had yelled "f-gg-t" at him and, also, had been throwing rocks at vehicles. But, the officer on the scene "NEVER HEARD :F–GG–T; [sic] YELLED" and the salesman was unable to identify anyone who had thrown rocks. Significantly, unlike the report described in the immediately preceding paragraph, the September 21 report makes no mention of rocks having been found. And it makes no mention of any vehicle having been damaged.

Unsubstantiated and contradicted reports to the police of alleged strike misconduct were not confined to employees of Respondent. At least one customer engaged in similar conduct. As set forth above, self-identified lawyer Andrea Johnson submitted a handwritten account of asserted harassment and name-calling to which she, her husband and two small children had supposedly been subjected on Saturday, September 11 and, also, of additional conduct which had occurred during the following Monday. Yet, her somewhat colorful account of what had occurred on September 11 was contradicted virtually in its entirety by Orchard Park Patrol Officer Siewert who had been present at Respondent on September 11 and, unlike Johnson, who appeared as a witness in this proceeding.

Siewert testified that he had been stationed on Respondent's entrance-exit island or median, approximately 200–250 feet from the service-door entrances on the west side of Respondent's facility. From there, testified Siewert, he had not heard any of the vulgarities which Johnson testified had been uttered when she dropped off her car and picked up the loaner. More importantly, according to Siewert, as Johnson was exiting in the loaner, with a male passenger in the front and a child in the backseat, she had to stop in the exit lane, approximately 5 feet from where he was standing on the median, not because any picket blocked her departure, but because a car was in front of her, attempting also to exit, and had stopped for traffic to clear on 159th Street. At that point, he testified, pickets were saying things, "expressing their dissatisfaction that people were patronizing" Respondent, but he denied that anything vulgar was being said.

Siewert testified that, while stopped to wait for the car in front of her's to exit, Johnson had rolled down the driver's side window. "I don't remember exactly what was said by either party," he acknowledged, but he testified that he did recall Johnson asking the pickets "why they were bothering" customers and the pickets explaining that they desired customers not to patronize Respondent. It was at that "point in time," according to Siewert, that "I heard another voice from inside the vehicle," which he believed had been that of the male passenger in the front seat—as does seem to be the fact—"utter the word f-gg-t at the picketer that was leaning in the front window," answering Johnson's question about "bothering" customers.

"At that point in time the person that was having the conversation with the driver asked the male passenger to step out of the car and tell him what he said," testified Siewert: "Why don't you step out of the car and tell me what you said?" According to Siewert, Johnson interjected that she regarded that remark as a threat and asked, "do you want to kick my husband's ass?" Siewert testified that the picket answered, "[N]o, I just want him to get out of the car so I can shake his hand." Whether that truly had been the picketer's intention or, alternatively, the picketer was being sarcastic and truly intended to threaten Johnson's husband, the fact remains that, as related by Siewert, the husband had initiated an acrimonious exchange by calling the picket a name intended to be and taken as offensive. Johnson asked Siewert why he was not taking any action, instead of "allowing this picketer to harass and insult and threaten her, her husband and her children," continued Siewert. After explaining that "the picketer had, at this point, committed no criminal act," he testified, Johnson asserted "well, I'll have you know that I'm an attorney and that's considered an assault," after which he disagreed, pointed out that the other car had exited, and said, "If you wish, you can leave," which Johnson proceeded to do.

During cross-examination Respondent attempted to diminish the candor of Siewert's testimony by eliciting that he was a member of a police union and, secondly, had been the target of complaints by Johnson to his police superiors, about what Johnson claimed had been Siewert's inaction on September 11. Yet, whatever force such objective factors might have in another context, here it appeared that Officer Siewert was being truthful in his description of what had occurred that day. Certainly, in light of what has been described above in this subsection, there is no basis for inferring that Orchard Park police personnel had been insensitive to, and unwilling to issue LOs to picketers for uttering, obscenities and other conduct which violated the police rules laid down for picketers to observe. There is no basis in the evidence for a conclusion that Siewert had acted any differently on September 11, than other officers would have acted had they, instead of Siewert, been present at Respondent that day. In fact, there is no evidence that Johnson's complaint to Siewert's police superiors had led them to conclude that the incident had involved anything other than he described when appearing as witness during the instant proceeding.

In contrast to Siewert's seemingly truthful testimony, Johnson was never called as a witness. In fact, none of the complaining customers or employees—who gave affidavits or statements and who made reports to the police—were called as witnesses. There was neither evidence nor representation that any, much less all, of them were not available to testify regarding their experiences at Respondent during the picketing. To be sure, records of regularly conducted activities, such as ones kept by an organization of customer complaints and activities occurring at its facility, are not subject to a valid hearsay objection. Fed.R.Evid. Rule 803(6). Relatively recently, nonetheless, the Board made clear its preference "for live oral testimony" by witnesses." *Westside Painting,* 328 NLRB 796 (1999). Obviously, a nonappearing person's written account of an event, even when admissible as a regularly-maintained document, leaves the record with evidence that is weaker than would be the situation were that person to testify, thereby being under oath, subject to cross-examination and, most importantly, allowing a trier of fact to observe that person's demeanor while testifying.

No one can legitimately argue that there had not been some acts of misconduct during the August–October picketing at Respondent. On the other hand, the foregoing scrutiny of some customer and employee complaints to police reveal that there had been a not insignificant amount of inaccurate, sometimes false, reporting of purported strike misconduct. Siewert's credible testimony refutes flatly the handwritten description by Johnson of conduct to which he and her family had supposedly been subjected on September 11. And there seems no reason to accord any greater weight to her handwritten description of what had occurred with "Mike" on

September 13. For example, she wrote, "I cannot get to my car because of the picketers," even though, as set forth in subsection A above, Respondent employs hikers who seemingly could have brought her serviced-vehicle to a location specified by her. In sum, the evidence supplied by Respondent is not so supportive of Taylor's and Nocera's claims of wide-ranging, ongoing strike misconduct and, in turn, not so supportive of a claimed need to conduct what can only be characterized as wide-ranging and ongoing photographic surveillance of employees' statutorily-protected activities.

Second, in fact none of the photographs and videotape show any misconduct on August 30 or 31, nor during Septembers. Obviously, a photograph records only what is occurring at the instant of its taking. Thus, the fact that one or a few pickets may appear to have been standing still at the 159th Street entrance-exit does not, in fact, mean that they had been doing so for any period prior to or after taking the picture. In fact, not one of the photographs introduced by Respondent (R. Exhs. 29 through 36) shows any vehicle halted on the street at the entrance to Respondent, nor in the exit lane leading from its facility. To the contrary, despite showing what appears to be a picket standing in the exit lane, Respondent's Exhibit 36 also appears to show a vehicle being able to exit onto 159th Street.

That particular photograph suggests another point. The police had told picketers that they could not stand in the entrance-exit, much less block ingress and egress through it. There is no evidence, however, that the police had prohibited pickets from patrolling across that entrance-exit, as they marched down the sidewalk and adjoining unbarracaded portion of the grass parkway. Beyond that, there is no evidence that the police had imposed any requirement that whenever a vehicle turned into the entrance, or drove down the driveway to exit, picketers in the process of patrolling, and preparing to patrol, across the entrance-exit had to promptly flee the entrance-exit and not enter it. So far as the record shows, pickets were permitted by the police to complete walking across the entrance-exit, as would any pedestrian, after which a vehicle could then pass.

Of course, as pointed out above, an employer suffering strike misconduct is entitled to take photographs of the strike, to substantiate that misconduct, even though some of that photographing "capture[s] protected" strike action. *National Steel & Shipbuilding Co. v. NLRB,* supra. Obviously, a union and employees bent on engaging in strike misconduct are unlikely to alert such an employer about when exactly those acts of misconduct will be occurring. So, to some extent, an employer confronting strike misconduct is left with no alternative but to conduct photographing and videotaping in situations when strike misconduct seems most likely to occur. But, so far as the record shows, that is exactly what Respondent did not do here.

Not one of Respondent's photographs and none of its videotaping during August 30 and 31and during September show any actual acts of misconduct. Yet, if the strike misconduct had been so extensive and ongoing as Taylor and Nocera attempted to portray it as having been, then surely Respondent would have been able to capture at least one photograph or one videotape segment of it during that period. After all, Nocera claimed that his car had been spit upon virtually every day when he left work. If so, then seemingly it would have been logical for Respondent to station someone with a camera—Maus or Miller, for example—or with a video camera when Nocera was planning to leave work for the day, to capture any misconduct occurring as he tried to exit. Similarly, Respondent knew when its employees were scheduled to arrive at and leave work for the day. Again, given the assertions of damage to their vehicles and abuse to which they were being subjected, a camera or video camera stationed to capture their arrivals and departures would seem to have been a logical course for Respondent to pursue, had it truly believed that those employees and their vehicles were targets of such misconduct. There is no evidence that Respondent did so, however. The fact that not one of its photographs captured any August-September strike misconduct is a rather strong indication not only that there had been fewer instances of actual strike misconduct than Respondent now generally claims, but also that Respondent's photographing and videotaping had an objective other than capturing purported strike misconduct.

Such a conclusion is reinforced by examination of the excerpted videotape introduced during the hearing. Presumably, Respondent chose to include on it scenes most likely to be characterized as misconduct. Respondent never disputed the testimony that it had been videotaping since August 30. Yet, the earliest date of any scene on the excepted videotape is September 28. And no other excerpts are included thereafter until those of October 13 through 16, after Respondent began ignoring the striking employees' offers to return to work, as described in subsection G below and as discussed in section II, infra. At that, for the most part those taped scenes show that vehicles entering and exiting were delayed for but one or two minutes before passing through the pickets. Indeed, it cannot be said from those video scenes that some delay had not been occasioned by the drivers' initiation of conversations with the pickets, just as Patrol Officer Siewert described Johnson as having done, as she had entered the exit lane—indeed, as Johnson herself acknowledged, in her statement, having done. In any event, despite its ongoing videotaping, Respondent apparently possesses no video of even arguable strike misconduct occurring before September 28.

Third, the fact is that, when he authorized the photographing and videotaping, Taylor had demonstrated no concern about confining it to recording instances of strike misconduct. Asked to describe what he had said to Maus, Taylor testified, "I told him to go out and take photographs of the picket line from on the dealership property and from across the street to get photographs depicting what was going on at that point in time." At no point did Taylor testify to having said anything to Maus—nor, for that matter, to Miller—about capturing photographs or videotapes of misconduct which might occur. Nor did Maus testify to having received such a limited instruction from Taylor.

In that regard, Respondent advanced ongoing concern about vulgar, obscene and racially erogatory language being utilized by picketers. In fact, as described above, one picket, a Machinists' agent, had been issued an LO for use of racially-derogatory language, and Respondent produced affidavits and statements asserting that such language had been used. Still, as also recounted above, there were instances when accusations about language utilized by pickets had been false accusations. The point at this stage is that Respondent acknowledged that its video camera had a sound-recording capacity. But, no recordings of vulgar, obscene or racially-derogatory language was offered during the hearing.

It cannot be overlooked that persons such as Tanya Love, according to the statement assertedly prepared by her, had resented use of certain words, such as scab, which the picketers had admittedly yelled at Respondent's employees and customers. Obviously, Finance and Insurance Manager Koleno, a heavyset individual, can hardly be faulted for having injured feelings at being called such terms as fat a— and doughboy. On the other hand, the Supreme Court has pointed out that, in the course of labor disputes, the protection of the Act extends to use of language which can be fairly be characterized as intemperate, even abusive. *Linn v. Plant Guards Workers Local 114*, 383 U.S. 53, 60–61 (1966). In fact, both in that opinion and in the one in *Letter Carriers v. Austin*, 418 U.S. 264, 283 (1974), the Court singled out "scab" as one illustration of language which must be tolerated under the Act, at least in situations when being utilized by a union and its supporters "to make [their] point." Id.

Based upon what the Court said in those cases, the Board has characterized use of the term "scab" as an attempt "to engender support among . . . fellow employees for [a] strike and to induce them to honor the . . . picket line." *Nor-Cal Beverage Co.*, 330 NLRB 610 (2000). Analytically, there is no reason for concluding that any different reasoning would apply when that term is directed to customers of a struck employer. In any event, the fact remains that Respondent now complains about use of language which, so far as the evidence discloses, it had made no effort to record, even though it concededly had the capacity to record it, had it truly been thought at the time to be so offensive.

Fourth, as pointed out above, Respondent has adduced no evidence that it had sought either a temporary restraining order or a permanent injunction, the purposes which Taylor claimed, when testifying, had motivated the photographing and videotaping. Indeed, Respondent presented no evidence whatsoever that it ever had even made any preparation to seek a temporary restraining order or a permanent injunction. Of course, talk—and, even, testimony—is cheap. In contrast, the absence of any evidence that an employer "even instituted proceedings seeking injunctive relief, much less relied upon the photographs as necessary or vital evidence," *NLRB v. Colonial Haven Nursing Home,* 542 F.2d 691, 702 (7th Cir. 1976); see also, *Larand Leisurelines, Inc. v. NLRB*, 523 F.2d 814, 819 (6th Cir. 1975), detracts significantly from Respondent's defense for having photographed and videotaped the picketing. Even if, as of the strike's commencement, Respondent had truly believed that misconduct might occur on the picket line, given the tendency under the Act for photographing and videotaping to inherently interfere with employees' statutory rights, "purely 'anticipatory' photographing of peaceful picketing in the event that something 'might' happen does not justify" such ongoing and

wideranging photographing and videotaping. *United States Steel Corp.*, 255 NLRB 1338, 1338 (1981), quoting from *Glomac Plastics, Inc.*, 234 NLRB 1309, 1320 (1978).

In fact, review of the police reports shows that the first actual incident of strike-line misconduct had not occurred until September 1 when, as described above, an exiting car was blocked and, then, a police officer was blocked while attempting to get to that vehicle and escort it onto 159th Street. Yet, by then Respondent had already been photographing and videotaping strikers for two days: August 30 and 31. And, beyond that, Respondent apparently failed to capture on film the incident about which the officer reported.

In sum, from the very first day of the strike Respondent had engaged in photographing and videotaping of the picketing, conduct which inherently tends to coerce employees in the exercise of their statutory right to strike and picket. Despite the number of pickets at Respondent from the strike's outset, Respondent has presented no evidence showing that, as of August 30 when the strike commenced, it could have fairly anticipated strike-line misconduct. In fact, so far as the police reports reveal, there was none until September 1 and, thereafter, only sporadic incidents of what can be truly characterized as misconduct on the picket line. Nonetheless, Respondent continued photographing and videotaping picketers without managing to capture even a single actual incident of strike misconduct. And it did so following the threats by Maus that whoever had started the Union's campaign would be fired, as described in subsection C above. Thus, the photographing and videotaping did not occur in an overall context free of unfair labor practices.

True, none of the photographs and only the September 28 portion of the excerpted videotape can be said to have shown any of Respondent's striking porters, detailers, parts department employees and drivers. However, absence of such images does not somehow obliterate the coercive impact of Respondent's photographing and videotaping. During the hearing Respondent presented only a relatively few photographs and only an excerpted videotape, despite the undisputed evidence that photographing and videotaping had occurred on an ongoing basis. It is a fair inference that Respondent had other photographs and videotapes which it chose not to present. And there is no basis for inferring, especially given Taylor's admitted instruction to Maus, that none of the nonproduced images are of Respondent's striking employees. In any event, even if Respondent truly had not photographed or videotaped even a single striking employee, there is no basis for concluding that the striking employees knew as much. So far as they knew, Respondent had captured them on film and was keeping that film as part of its records. Therefore, I conclude that a preponderance of the credible evidence establishes that Respondent did engage in unlawful surveillance of employees' statutorily-protected activities, thereby interfering with, restraining, and coercing those employees in the exercise of rights protected by the Act, in violation of Section 8(a)(1) of the Act.

F. Unlawful Threats Attributed to Koleno and Nocera on September 2

A significant amount of testimony has been devoted to the allegation that, on September 2, Finance and Insurance Manager Koleno threaten strikers with discharge and, also, that General Sales Manager Nocera threatened them with physical harm. All parties agree that, on that date, there had been an exchange of words between Koleno and some pickets, one of whom was Chiarito. Respondent denies that Koleno had said anything unlawful to pickets and, further, denies that he has been a statutory supervisor and agent at any time material to the consolidated complaints' allegations. While it admits the supervisory and agency status of Nocera at all material times, it denies that he had made the statement attributed to him by the General Counsel and Union. In the end, however, neither Koleno nor Nocera denied with particularity the statements attributed to each of them.

As pointed out, everyone agrees that on September 2 there had been an exchange of words between Koleno and some picketers, principally Chiarito. And there is no dispute about the fact that, at least at some point, Nocera had joined Koleno, as the latter stood on the apron of Respondent's parking lot, near picketers patrolling on the sidewalk. However, there was a dispute regarding how Koleno and Nocera came to be there.

Koleno testified that on September 2 he had gone to "the front west side of the used car lot, in the front line." Asked during direct examination how he had come to be there, Koleno answered only, "I was performing one of my job duties." Pressed to be more precise, Koleno appeared to be evading a direct answer, responding only, "Sometimes I have to go out on the lot to get a VIN [vehicle identification number] number [sic] or mileage off a vehicle, because when I sell a service contract I need the in service date and I get that from the VIN number [sic]." Of course, that answer did not supply the actual reason for Koleno's presence on Respondent's parking lot that day. Still, counsel seemed to accept it as the actual reason, similar to what occurred regarding the August 27 date suggested by counsel to Pollastrini and Dove, as described in subsection C above.

Interrogated further concerning his reason for having been on the parking lot on September 2, Koleno answered initially, "Yes, I took down the [vehicle identification] number." But, then, he equivocated: "Again, I don't know if I wrote down a number, didn't write down a number, but at that time I was finished doing whatever I was doing, because I was told [by Nocera] to go inside." Yet, later, when asked if he had been out on the used car lot recording a VIN, Koleno responded, "Yes." He denied that he had been doing so to help a salesman close a deal, but he answered evasively when asked whether he had needed a VIN for a customer—"A lot of times I'll get VIN numbers, the customer may or may not have been present, for warranties. So chances are, maybe it was a vehicle that was"—then claimed "I don't remember" if he had been getting a VIN for a customer that day. In sum, the record is left with no reliable explanation for Koleno's presence on the used car lot on September 2.

Nocera testified that, on that date, he and Vice President and General Manager Taylor had observed, from "the showroom floor," that Koleno "was out on the front line of the lot." According to Nocera, "Barry [Taylor] asked, 'What's he doing out there?'" Then, testified Nocera, Taylor said to Nocera, "Would you go out and get him, please, and bring him back here?" Nocera testified that he then went out to the edge of Respondent's parking lot and told Koleno to go back to Respondent's building. Significantly, Taylor had been present, as Respondent's designated representative under the sequestration rule, during that testimony by Nocera. Yet, when testifying afterward, Taylor never corroborated any aspect of Nocera's account about having seen Koleno on the front line of cars and about having been asked by Taylor to get Koleno and bring him back to the building. The significance of such a lack of corroboration, and of Koleno's and Nocera's accounts about having arrived separately near the front of the parking lot, is that virtually every striking employees and union official, asked to describe their September 2 encounter with Koleno and Nocera, testified that Koleno and Nocera had come together to near the picket line on the sidewalk and grass parkway.

Detailer Pollastrini and porter Chiarito testified to having first seen Koleno and Nocera together as they exited through a door on the west side—the side facing the BMW dealership to the west of Respondent, as mentioned in subsection A above—of Respondent's building. Porter Dove and Teamsters Local 777 Business Agent David Born (picketing as one of the other unions' supporters for the Union's strike against Respondent) each testified that they first had seen Koleno and Nocera walking together in front of Respondent's showroom. Those accounts are not inherently inconsistent with those of Pollastrini and Chiarito, given that Koleno and Nocera could have walked from the west side of the building to its front and, from there, in a southwestern direction to the front of the lot. Machinists' Organizer Mullin testified that he had first observed Koleno and Nocera, together, "in the lot full of new cars." Parts driver Mataczynski testified that he had first observed Koleno and Nocera "[i]n the used car lot," where they spent "10 to 15 minutes" looking at cars. Director of Organizing Logan testified that, "When I first saw them they had reached the first row of used cars."

Only Union Secretary-Treasurer Hancock gave testimony at odds with that recounted in the immediately preceding paragraph and, concomitantly, tending to support Koleno's and Nocera's accounts that they had arrived separately at the picket line on September 2. During direct examination Mullin did testify, "I saw them exit the car dealership from the center doors" and, moreover, "They were walking directly, would be directly south, to the sidewalk area, in front of the dealership." During cross-examination, however, Mullin testified that as Koleno had been bickering with picketer Chiarito, the former near the parking lot's edge and the latter on the sidewalk, "David Nocera had entered or had decided to join Todd's side"; "He exited the dealership to join this Todd fella."

Actually, there may be less discrepancy among those accounts than might initially appear to be the fact. Koleno is a heavyset individual and, it is not contested, from the strike's inception he had been a target of name-calling. He was called a scab, loser, fat ass, and a doughboy. Those names were again shouted at him on September 2, as he approached the front of the parking lot. He said something to the picketers, in response, but they could not hear what he

was saying and one or more picketers called to him to come closer, so that they could hear what he was saying. Now, it may be that Koleno and Nocera had been together when Koleno came out to transact whatever business he intended to conduct at one of the cars and, then, Koleno had come closer to the picketers, in response to invitations to do so, while Nocera held back and remained where he and Koleno initially had been before those invitations.

As to what had been said when Koleno came within hearing distance of the picketers, he and Chiarito testified that Koleno asked why Chiarito was "doing this"—apparently shouting names, but possibly continuing to picket—since Koleno "thought you [Chiarito] had a job at Jewel." Chiarito, Pollastrini, Dove, Mataczynski, Mullin and Local 777 Business Agent Born each testified that Koleno had also said, in essence, that if or when all of the striking employees "get in here," or "get back in here," or "come back in here" or "get back inside," they would all be "fired" or lose their jobs. In fact, Koleno never testified with particularity that he had not said that to Chiarito and other picketing employees of Respondent. Instead, he testified only that, in response to his question about having a job at Jewel, Chiarito had begun shouting "he's hassling me, he's hassling me," after which other picketers began running over and accusing him (Koleno) of having told "Mike that he would lose his job," an accusation which Koleno testified that he denied promptly: "I said [to the picketers] that's not what I said." But, while appearing as a witness, Koleno never actually denied having told the picketing employees that they would be fired or lose their jobs when they returned from the strike.

Chiarito testified that he had not said anything in response to that statement by Koleno. In his prehearing affidavit, however, Chiarito stated that he had said "Yeah" or "Right" to Koleno. Dove testified that he did not recall anyone saying anything back to Koleno. However, detailer Pollastrini testified that, after Koleno's statement, "we were laughing and stuff," and calling "them"—Koleno and Nocera—"chump, scab" and "Pillsbury boy" In addition, Pollastrini admitted that he had called Koleno a, "F—king idiot." Mataczynski testified that, in response to Koleno's statement, pickets had called Koleno "a loser" and had told him to "take a walk." And Mullin testified that he had heard the pickets saying, "You're losers."

As set forth above, Nocera acknowledged that he had come to the area where Koleno had been standing, though supposedly only after Koleno had already been there for a period. Mataczynski, Pollastrini, Dove, Chiarito, Mullin, Born, and Logan each testified that while with Koleno, Nocera had said to the pickets that he intended to kick the striking employees' asses when they "come back" or "get back in," punctuating that remark with the gestures of pointing to his own and pickets' heads and, also, making a kicking motion with his leg and foot.

Nocera denied having made any gestures and, generally, denied that there had been any conversation after he had told Koleno to return to the building. Nevertheless, Nocera did not deny with specificity having said that he intended to kick picketing employees' asses when they returned to work. Nor did Koleno do so, though he did generally deny that Nocera had said anything to the pickets and did deny that either he or Nocera had made any gestures toward the pickets.

Dove, whose testimony about the incident showed that his recollection of it was less than perfect, testified that none of the pickets had said anything after Nocera's statement. So, also, did Chiarito. Still, other employees and three union officials testified that pickets had responded to Nocera. Thus, Mataczynski testified that "we started yelling at" Koleno and Nocera, "calling them losers." "We kept calling them a scab," testified Pollastrini, and "started calling them names again." Logan testified that he had heard picketers making comments such as "go buy and sell a car"; "[t]he lot doesn't look busy," and "who's going to make your mortgage payment?" Born testified that one of the pickets had said to Nocera something like, "Yeah, right. Whatever." Hancock, the Union's secretary-treasurer, testified that Chiarito had responded to Nocera, "You want to kick our ass, then come on out here and get going. Get at it," or, "Anytime that you think you can kick my ass, then let's have at it."

I credit the essentially undenied and corroborative accounts that Koleno, in fact, had said that striking employees would be fired or lose their jobs and, further, that Nocera had said that he would kick their asses when they returned to work for Respondent. Focusing, first, on the latter statement, as a general proposition an employer violates the Act when threatening to inflict bodily harm on employees for engaging in concerted protected activity, such as striking. See, e.g., *Highland Plastics, Inc.*, 256 NLRB 146, 147 fn. 7 (1981); *Refuse Compactor Service*, 311 NLRB 12, 12–13 (1998). Yet, more was involved on September 2 than simply a threat by Nocera to eventually kick picketing employees' behinds. In evaluating what he had said, and whether it had actually constituted an unlawful threat, the totality of the situation must be considered. See, e.g., *Torbitt & Castleman, Inc. v. NLRB*, 123 F.3d 899, 906 (6th Cir. 1997); *National By-Products, Inc. v. NLRB*, 931 F.2d 445, 452 (7th Cir. 1991).

Regardless of whether Koleno and Nocera had come together to the edge of the parking lot on September 2, or had arrived there separately, the employees' and union officials' accounts plainly show that the encounter had begun with name calling being directed at Koleno and, then, Nocera and, moreover, with picketers inviting Koleno to come closer to the picket line. As discussed in the immediately preceding subsection, such name calling, to the extent that it does not become vulgar and obscene, at least, is contemplated under the Act in strike situations. Even so, name-calling can provoke its target to become upset, even angered, and no one should anticipate that there will be no response in kind to it. In fact, the Board has held that name-calling by supervisors and employers' agents does not violate the Act, because it is protected under Section 8(c) of the Act, see, e.g., *Salvation Army Residence*, 293 NLRB 944, 944 (1989), making allowance for "picket line rhetoric," *NLRB v. Hartman Luggage Co.*, 43 F.2d 178, 184 (6th Cir. 1971); *Wayne Stead Cadillac*, 303 NLRB 432, 438 (1991), seemingly no less for employers' agents than for employees.

True, Nocera did not call the picketers names; he said that he would kick their derrieres upon their return to work. But, a threat to kick people's asses appears to have been one phrase du jour utilized by both sides during the strike. Yet, there is no evidence that anyone ever actually did, or even tried to, kick someone's else's rear during the strike at Respondent. In fact, that same remark is not uncommonly utilized in the course of human discourse in other settings. But, it is a rare—perhaps nonexistent—occurrence when the maker of such a statement ever follows through on such a remark: walks around the listener and attempts to boot him/her. At best, the statement is a hollow one: more rhetorical than literal warning of actual intention to follow-through with such an action.

That seems to have been the strikers' conclusion. That Nocera's remark had not been taken seriously—as an actual expression of intent to eventually kick returning strikers' behinds—tends to be shown by the responses that Mataczynski, Pollastrini, Logan, and Born described. Chiarito apparently took it seriously. Rather than being intimidated by Nocera's statement, however, Hancock testified that Chiarito had expressed willingness to take on Nocera right then and there—in short, he reacted to that remark by Nocera in the same fashion as Nocera appears to have reacted to the names which he (Nocera) was being called by the pickets: belligerently.

As concluded in preceding subsections, Respondent has engaged in unfair labor practices which inherently intimidate employees in the exercise of their statutory right to become represented. But, none of it had involved Taylor, Maus, or Miller going to the picket line and directing statements of intent to become physical with picketers. And there is no basis for inferring or concluding that Nocera had gone to parking lot on September 2 with the intention to threaten to kick picketers' rear ends. Instead, so far as the evidence discloses, it had been the name-calling, only, which had led to his spontaneously-uttered statement. Further, nothing in that statement implied that Nocera intended to take any economic reprisals against the pickets, as Maus had clearly threatened expressly and as was implied by the photographing and videotaping.

In sum, on September 2 a "war of words," *United Technologies Corp.*, 313 NLRB 1303, 1305 (1994), had broken out, as picketers shouted names at Koleno, initially, and then at both Koleno and Nocera. Nocera responded in kind, saying that at some future time he would kick picketers' asses. There is no evidence that any of the employees were intimidated by that response; most laughed at Nocera and Chiarito offered to take him on then and there. Accordingly, I conclude that Nocera's response constituted no more than a counter-salvo in the ongoing war of words that had broken out that day—a riposte similar in kind to the names being directed at him by the pickets. A preponderance of the credible evidence does not support a conclusion that Nocera had unlawfully threatened striking employees with physical harm.

Koleno's effectively uncontroverted statement to the picketers is another matter. As set forth in subsection C above, a threat of discharge is a serious violation of the Act. Even if made in response to employees' name calling, it is a type of statement which transgress allowable riposte to name-calling, in the same fashion as a picketing employee's threat to beat up a nonstriker could have exceeded the bounds of protected activity. Yet, that does not conclude analysis of Koleno's threat. Still to be considered is the question of whether his threat should be regarded as no more than one made by a nonstriking employee or, instead, as one attributable to Respondent.

Despite the inclusion of Koleno among the supervisors listed in cocounsel's first statement of position, described in subsection A above, there is really no evidence that Koleno had ever exercised independent judgment in connection with any of the supervisory powers enumerated in Section 2(11) of the Act. His job involves essentially preparation of documents: sales contracts, loan documents, insurance forms and papers. He also handles after-market sales and service purchases for which prices are set on after-sales sheets. There is no evidence that, when performing those duties, Koleno ever has possessed any ability to vary any prices on those sheets, nor on sales amounts worked out between customer and salesman. Cf. *Downtown Toyota*, 276 NLRB 999, 1001 fn. 4 (1985).

There is another employee who works in the same department as Koleno. But, no evidence was adduced concerning the relationship between that employee and Koleno. Thus, there is no evidence which would support a conclusion that he has ever exercised any supervisory authority over that employee. Instead, the General Counsel proceeded along five other avenues.

First, emphasized is the fact that Koleno, like many of Respondent's acknowledged statutory supervisors, has the word "manager" in his title: Finance and Insurance Manager. Yet, unlike those other managers there is no evidence that the finance and insurance manager possesses any of the statutorily-prescribed supervisory powers. In fact, his duties in connection with sales of vehicles are more akin to those of nonsupervisory salespersons, than to those of managers who do possess supervisory powers. In any event, inclusion of the word "manager" in his title does not suffice to establish supervisory status under the Act. "The Board, however, has long held that the use of a title does not make an employee a supervisor." (Citation omitted.) *Fleming Cos., Inc.*, 330 NLRB 277 (1999). See also *Gensler Lee, Inc.*, 241 NLRB 682 (1979).

Second, Koleno attends at least some of Respondent's managers meetings, particularly full-management ones. Given his financing duties, that is hardly surprising, since all aspects of Respondent's operations are discussed at full-management meetings. So far as the record discloses, Koleno is the best-positioned individual to provide financial, particularly insurance, information during such meetings. In any event, attendance at such meetings, of itself, does not confer supervisory status under the Act. See, e.g., *MDI Commercial Services*, 325 NLRB 53, 57 (1997), enf. denied in part on other grounds 175 F.2d 621 (8th Cir. 1999), and cases cited therein. In fact, there is no evidence that personnel are discussed during such meetings, much less that decisions are made during those meetings about such matters as hiring, disciplining and granting benefits to employees. Even if such matters are covered during those meetings, there is no evidence whatsoever that Koleno is a participant in discussions about them. Accordingly, his "attendance at these meetings does not indicate he possessed supervisory authority." *Auto West Toyota*, 284 NLRB 659, 661 (1987).

Third, Nocera agreed that should he and all new and used car managers be absent from Respondent, then Koleno would be the highest-ranking manager left there and would have to handle business in the absence of all other managers. But, that agreement was no more than speculative. In fact, there is no evidence that absence of all those managers had ever occurred. Even if that may have occurred on some occasions, there is no evidence that such occasions had been more than sporadic and limited in duration. Absent some showing of regularity, it cannot be said that any sporadic and limited service as a sales-related manager would serve under the Act to confer supervisory status on Koleno. See, e.g., *MDI Commercial Services,* supra, 325 NLRB at 59, and cases cited therein. In fact, even had such sporadic and limited replacement of other managers occurred, there is no evidence that Koleno would have had authority to take action regarding personnel matters, as opposed to simply reporting anything untoward that may have occurred after sales-related managers returned.

Fourth, two employees—Dove and Chiarito—testified that Koleno had sometimes told them to clean his (Koleno's) demo and office, as well as having told porters to get cars ready for the showroom and customers. However, telling porters when cars needed to be gassed and cleaned for customers or the showroom has not been shown to have been an exercise in independent judgment. Obviously, when a car is sold, and the financing and insurance aspects of the sale completed, someone has to tell a porter to ready it for the customer. That is no more than continuation of the process of selling a car. Similarly, someone has to tell a porter when a vacancy or change on the showroom necessitates bringing a replacement vehicle there. Significantly, there is no evidence that Koleno exercises any discretion in deciding which vehicles will be selected for showroom display. So far as the evidence discloses, when he tells porters to ready cars for showroom display, Koleno is doing no more than implementing decisions already made by someone else, much the same as he would relay information to porters about cars which must be readied because they have been sold.

Significantly, Chiarito testified that while he would eventually do as Koleno said, he would not interrupt his ordinary duties, already under way, to comply with what Koleno said needed to be done: he would first finish his scheduled work. There is no evidence that Chiarito, or any other employee, was ever disciplined or, even, admonished for not immediately doing whatever Koleno had said needed to be done.

It appears that porters ordinarily clean Respondent's facility and its cars. So, whenever telling one of them that a demo or an office needs cleaning, there is no evidence that Koleno is doing anything other than pointing out that ordinarily-performed work needs to be done. A conclusion that statements to that effect confer supervisory status would convert into a statutory supervisor any employee who told a service or custodial employee that a wastebasket needed emptying or a floor needed moping. See, e.g., *Beverly Enterprises, West Virginia v. NLRB*, 136 F.3d 353, 358 (4th Cir. 1998) (section C.).

In similar vein, testimony was elicited from Mataczynski to the effect that, even though his own supervisor had told him that he could smoke in a particular area, Koleno had yelled at him about smoking in that area and he (Mataczynski) had put out his cigarette. Yet, there is no evidence that Koleno could have compelled Mataczynski to stop smoking in that area, especially as the latter's acknowledged supervisor had told him that he could do so. And there is no evidence that had Mataczynski told Koleno to take a hike, and continued smoking, any disciplinary action would have been taken against Mataczynski, again especially in light of what his supervisor had said to him. In short, so far as the record shows, Mataczynski's acquiescence to Koleno's complaint appears to have amounted to nothing more that the all too common reaction of smokers to the zealotry all-too commonly displayed by nonsmokers.

Finally, the General Counsel elicited employee-testimony that at least some employees believed that Koleno is a supervisor. Of course, such employee-opinion has been held to be a relevant consideration. See, e.g., *NLRB v. Raymond Buick, Inc.*, 445 F.2d 644, 645 (2d Cir. 1971). Nevertheless, such opinions constitute only a secondary indicium of supervisory determinations and "secondary indicia are not dispositive in the absence of evidence indicating the existence of any one of the primary indicia of [supervisory] status." (Citations omitted.) *Chrome Deposit Corp.*, 323 NLRB 961, 963 fn. 9 (1997). To allow employee-belief to govern an individual determinations of supervisory status would be to potentially deprive statutory employees of the Act's protection, as well as saddle employers with potential liability for conduct by employees who are not truly statutory supervisors. *Azusa Ranch Market*, 321 NLRB 811, 812 (1996); *Hydro Conduit Corp.*, 254 NLRB 433, 441 (1981).

In sum, I conclude that a preponderance of the credible evidence fails to establish that Todd Koleno had been a statutory supervisor during times material to this proceeding. However, a contrary conclusion is warranted when his status is evaluated in the context of Section 2(13) of the Act's agency definition. To conduct that evaluation in the context of Koleno's situation, the question to be answered is whether Respondent's manifestations, verbal and nonverbal, to its porters, detailers, hikers, parts employees and drivers led them to logically believe that Koleno's discharge threat could be attributed to Respondent, because of apparent authority conferred upon him by it. See, e.g, *Dentech Corp.*, 294 NLRB 924, 925–926 (1989); *Overnite Transportation Co. v. NLRB*, 140 F.3d 259, 267 (D.C. Cir. 1998); *NLRB v. Mine Workers Local 1058*, 957 F.2d 149 (4th Cir. 1992). At first glance, that might not seem to be the fact, but rather that the threat can be regarded as no more than a rhetorical riposte by a nonunion-supporting employee to being called names by union supporters.

Koleno worked pretty much in isolation from other employees and most of his daily contacts appear to be with Respondent's salesmen. He may notify porters whenever they need to perform certain duties, such as preparing cars for customers or the showroom. Yet, there is no evidence that he had ever been involved in any labor relations aspect—determining wage

increases, preparing evaluations of their work, taking or recommending discipline—of other employees' employment with Respondent, even the one other employee who works in his department. Cf. *Sears Roebuck de Puerto Rico*, 284 NLRB 258, 259 (1987). Beyond that, there is no evidence that Koleno had ordinarily relayed information between Respondent and its employees, such that he could be logically viewed as some type of communicator or conduit between Respondent and employees. Cf. *GM Electrics*, 323 NLRB 125, 125–126 (1997); *Southern Bag Corp.*, 315 NLRB 725, 725 (1994); *Einhorn Enterprises*, 279 NLRB 576, 576 (1986).

On the other hand, while he performs none of the duties ordinarily performed by Respondent's sales managers, cf. *Port East Transfer*, 278 NLRB 890, 895 (1986), he does possess in his title the word "manager," as do admitted supervisors who also have that word in their titles. That is some indication to employees that Koleno occupies a higher position that a rank-and-file employee might be expected to occupy. See, e.g., *Zimmerman Plumbing Co.*, 325 NLRB 106, 106 (1997); *Dentech Corp.,* supra, 294 NLRB at 926. Beyond that, as set forth above, his role as a manager requires his attendance at management meetings, particularly full management meetings. His attendance at such meetings is some indication to employees that Koleno is "privy to management decisions," *Waterbed World*, 286 NLRB 425, 427 (1987), and "privy to the Respondent's policies and objectives." *Zimmerman Plumbing Co.,* supra. Thus, while there is no showing that his discharge threat had been authorized by Respondent, the fact that he made it is, of itself, some indication to employees that Koleno was articulating, in a moment of anger caused from being called names, information to which he had become privy about a decision already made by higher management. Certainly, such a statement is not one ordinarily made by someone with absolutely no information about a course that higher management is likely to pursue. And he was put in that position by Respondent.

His September 2 discharge threat was the same type of threat which Maus had made only a few days earlier, as concluded to have been unlawful in subsection C above, the only difference being that Koleno's threat appears aimed at all employees who were striking, rather than being limited to ones who had started the Union's campaign. In consequence, Koleno's threat was "consistent with the message . . . conveyed by" Maus. (Footnote omitted.) *Dentech Corp.,* supra. Moreover, as described in subsection G below and as discussed in section II, infra, Koleno's threat was consistent with threats of discharge made on the following day by Sizemore and, also, with the threat made by Nocera on September 29. In fact, Respondent returned to employment not one of the strikers, despite their unconditional offers to return, and only belatedly offered to reinstate one of them. And it discharged the leading employee-union adherent and one other striker. True, those actions were not taken until after Koleno's September 2 threat. As the Board recently pointed out, however, subsequent events can lead to fuller employee-realization of the significance of statements—be they interrogations or threats—directed to them. *Westwood Health Care Center*, 330 NLRB 935, 940 (2000).

The foregoing considerations, viewed in their totality, warrant a conclusion that, given Koleno's position as manager and his attendance at some management meetings, coupled with the consistency of his threat with Respondent's previous and subsequent unlawful conduct, Koleno had been placed in a position where employees could logically be led to believe that he had been speaking for Respondent when he threatened eventual discharge of strikers. Even if Koleno had made that threat because provoked at being called names, that would show no more than that he had blurted out an intention of Respondent about which he had learned by virtue of his position.

One additional factor is worth brief consideration. Whether he accompanied Koleno out onto Respondent's parking lot, or arrived there after Koleno, Nocera had been present with Koleno at the picket line on September 2. Nocera denied having heard Koleno say anything to the pickets. That denial may be plausible. Even had he accompanied Koleno out to the parking lot, the two of them may have been looking at cars and Nocera's attention may have been for a period focused elsewhere when Koleno first approached the picket line. Moreover, name calling was going on and there was traffic noise which could have muffled for him what Koleno said to the pickets. Nonetheless, there is no evidence that the strikers would have realized that Nocera may not have heard Koleno's threat. So far as they were aware, he had heard what Koleno had threatened, but had not disavowed that threat. In short, Nocera's very presence with Koleno on September 2 was an added indication to striking employees that Koleno's threat reflected Respondent's actual intention.

In sum, I conclude that a preponderance of the credible evidence warrants the conclusion that Koleno had threatened that striking employees were going to be fired or lose their jobs and, secondly, that his position and the circumstances before and after his threat would lead employees logically to believe that he was expressing a view harbored by Respondent. Therefore, I conclude that Respondent violated Section 8(a)(1) of the Act as a result of Koleno's threat.

G. Alleged Unlawful Discharges and Refusals to Reinstate Strikers

On September 1 or 2 the Union added to the object of the strike, from the purely economic one of seeking recognition to one also protesting the threats made by Maus to Pollastrini, Dove and Chiarito. Logan testified that he had been the Union's official who had made that decision, after having conferred with his union superiors. He further testified that he had done so because, as the picketing progressed on and after August 30, he had learned from Pollastrini, Dove, and Chiarito about the interrogation of them and the discharge threats which Maus had made to them, as described in subsection C above. Chiarito agreed that he had mentioned Maus's remarks to Logan and testified that he had begun asking other striking employees if they had been subjected to like conduct. Pollastrini and Dove each testified that he had reported to Logan what Maus had said to them.

Before making any change in the strike's object, Logan met with, at least, many of the striking employees and explained that, because of the threats by Maus, the object of the strike was going to be changed, to protest unfair labor practices would be protested. Apparently Logan made no mention to those employees of the unlawful interrogations by Maus and, seemingly, he had no knowledge of what Taylor had said to employees during the morning of August 30. The strikers agreed to the change described by Logan, though some of them may not have fully understood all implications of it. Nevertheless, their testimony showed that they clearly did believe that it was wrong for Respondent to threaten retaliation against employees for seeking to become represented. Thereafter, recognition stickers were pulled off the picket signs, exposing the unfair labor practice legends, and the strike was publicized as one in protest of unfair labor practices.

That sequence of facts has led the General Counsel to allege that the strike had been converted to an unfair labor practice strike on or about September 1. Even if the conversation had not occurred until September 2, the 1-day difference would have no effect upon the ultimate related issue posed by Respondent's failure to reinstate strikers on and after September 30. For, the census report (R. Exh. 38) shows that Respondent had hired no porters, detailers, parts department employees or drivers until September 3. On that day parts driver James Arcudi was hired and, then, over the course of succeeding days other employees were hired. In reality, however, the issue of economic v. unfair labor practice strike is not so important as the parties appear to believe, given Respondent's failure to carry its burden of establishing that any replacement employees had been hired as permanent replacements, as discussed in section II, infra. Even so, the issue should not simply be ignored.

"If an unfair labor practice had anything to do with causing the strike, it was an unfair labor practice strike." *NLRB v. Cast Optics Corp.*, 458 F.2d 398, 407 (3d Cir. 1972), cert. denied 409 U.S. 850 (1972), quoting *Teamsters Local 662 v. NLRB*, 302 F.2d 908, 911 (D.C. Cir. 1962), cert. denied 371 U.S. 827 (1962). Of course, here the strike did not begin in actual protest of Respondent's pre-August 30 unfair labor practices but, instead, began with the object of achieving recognition of the Union as the collective-bargaining representative of Respondent's porters, detailers,

hikers, parts department employees, and drivers. Still, it is long-settled that an economic-originated strike can be converted to an unfair labor practice one, as a consequence of an employer's unfair labor practices. See, e.g., *Soule Glass & Glazing Co. v. NLRB*, 652 F.2d 1055, 1079 (1st Cir. 1981). Although evaluation of particular situations is sometimes expressed in shorthand terminology, conversion can occur in either of two ways. See, e.g., *SKS Die Casting & Machining v. NLRB*, 941 F.2d (9th Cir. 1991) (section V.).

First, just as a strike can commence to protest unfair labor practices, *NLRB v. Cast Optics Corp.,* supra, so also can it be converted by employees' decisions to protest employers' unfair labor practices. Ordinarily that occurs whenever unfair labor practices are committed while an economic strike is in progress, such as here with regard to the surveillance discussed in subsection E above. But, no authority seems to preclude valid conversation from occurring whenever an economic strike is already in progress and strikers discover that unfair labor practices had been committed by their employer before the strike had commenced. That is what occurred here.

Pollastrini, Dove, and Chiarito obviously knew before the strike began that they had been threatened by Maus. Still, the record does not disclose a basis for inferring that any one of those three employees had realized that Maus's threats constituted a violation of the Act. In fact, it is not uncommon for employees not to appreciate that comments made by their employers rise to the level of unlawful ones. Yet, neither the Board nor any circuit courts of appeal have ever required employees to possess the knowledge of attorneys. Beyond that, there is no basis for inferring that, regardless of what those three employees had known, the Union and other employees of Respondent had known about Maus's threats before the strike commenced.

Under this alternative, what is important is that the General Counsel establish that the strike's conversion truly had been caused by a decision of the Union and striking employees to protest Respondent's unlawful prestrike threat. See *NLRB v. Top Mfg. Co.*, 594 F.2d 223, 225 (9th Cir. 1979). To make that determination, there seems no reason to apply a different causation standard in conversation situations than is applied in evaluating whether or not a strike at its inception had been in protest of an employer's unfair labor practices. In both situations employees' reasons are evaluated by what they believed and intended. See discussion, *Decker Coal Co.*, 301 NLRB 729, 746 (1991). That is, no matter how phrased, the test is whether employees knew about the employer's conduct and sought to strike in protest of it. To make that determination several factors are considered. Id. at 748.

There is no evidence that the Union had even considered labeling its strike as an unfair labor practice one until Logan learned about what Maus had said to Pollastrini, Dove, and Chiarito. To be sure, Logan focused only on the discharge threat, apparently attaching no weight to Maus's questioning of those three employees. Even so, as concluded in subsection C, Maus's threats had constituted an unfair labor practice, indeed a serious one. So, a strike in protest of those threats would be fairly characterized as a strike protesting a serious type of unfair labor practice. Never to my knowledge has it been required that every unfair labor practice committed had to be the reason for a strike, before that strike could be categorized as an unfair labor practice strike.

After learning about what Maus had said, Logan told assembled employees that he was going to change the strike's object because of Maus's threats. Several employees expressed agreement; others said nothing. But, so far as the record discloses, not one striking employee expressed disagreement with the proposed change. Recognition stickers were removed from picket signs, revealing the unfair labor practice legends underneath those stickers. Thereafter, the strike was publicized as an unfair labor practice strike. And on September 2 Logan signed the charge in Case 13-CA-38061—though the charge was not docketed by the Regional Office until September 7—and included in the allegations made in that charge was "THREATENED EMPLOYEES WITH LOSS OF JOBS." As pointed out in *Decker Coal*, those are all objective factors which support a conclusion that a strike actually had been in protest of unfair labor practices. Even had some of the striking employees not fully understood the underlying nuances of change in strike objective, they were entitled under the Act to rely upon the objectives stated by the bargaining representative whom they had selected to represent them, by virtue of having signed authorization cards.

True, after the change the striking employees continued to seek recognition of the Union as their bargaining representative. Yet, there is no requirement that protest of unfair labor practices be the exclusive reason for a strike's continuation in order for it to become genuinely converted to an unfair labor practice strike. "Employees are unfair labor practice strikers if an employer's unlawful conduct contributed in part to their decision to strike, even though their decision also may have been influenced by economic issues." (Footnote omitted.) *Chromalloy American Corp.*, 286 NLRB 868, 873 (1987). However, the Union and striking employees' continued recognition object leads to consideration of the second way in which a strike can be converted from economic to unfair labor practice strike: prolongation of a strike resulting from unfair labor practices. See, e.g., *F. L. Thorpe & Co.*, 315 NLRB 147, 149 (1994), enf. denied in context 71 F.3d 282 (8th Cir. 1995); *Vulcan Hart Corp. v. NLRB*, 718 F.2d 269, 276 (8th Cir. 1983).

The strike began with the objective of persuading Respondent to recognize the Union as the representative of porters, detailers, hikers, parts department employees, and drivers. While Respondent refused to extend recognition, it never expressed any doubt about the Union actually representing a majority of those employees. Instead, both before and after the August 29 recognition request, Respondent engaged in conduct—interrogations, threats, surveillance, discharges, and refusals to allow strikers to return to work after they had unconditionally offered to do so—which interfere with, restrain and coerce employees in the exercise of statutory rights and, with respect to the discharges and refusals to return strikers to their jobs, discriminate against employees in violation of the Act' proscriptions. As concluded in section II, infra, Respondent's refusal to recognize the Union had been unlawful.

Given that conclusion, in reality the strikers had been protesting an unfair labor practice since the inception of their strike. Moreover, Respondent's ongoing refusal to recognize the Union had prolonged the strike's duration, though resolution of its unlawful interrogations, threats, surveillance, and discharge of Patrylak would likely have to have been resolved before the strike would have been concluded. One way or the other, whether or not the striking employees actually possessed the knowledge of attorneys and realized that Respondent's refusal to recognize the Union actually constituted an unfair labor practice, the evidence establishes that the ongoing unlawful recognition refusal was an unfair labor practice that prolonged the strike. Therefore, the strike's objective had actually been changed because of Respondent's unlawful threats and the strike was being prolonged because of Respondent's unlawful refusal to recognize the Union as the representative of employees in a stipulated appropriate bargaining unit. It was an unfair labor practice strike.

The post-September 2 alleged unfair labor practices, though severe, are relatively straightforward ones. For the most part, the events underlying those allegations are either admitted or undenied. The first concerns detailer Patrylak who, at approximately 4:30 p.m. on Tuesday, August 31, had abandoned the strike and returned to work for Respondent. He worked a full day on Wednesday, September 1. At the end of that workday, he decided to resume striking against Respondent and did not report for work on the following day, but returned to the picket line.

As set forth in subsection A, the now-disavowed September 24 statement of position asserted that Patrylak "had gone back and forth between striking and working several times," an assertion not supported by the evidence and, as well, an assertion which could only have been based upon information related to cocounsel by Respondent, since there is no evidence that cocounsel stationed himself at Respondent for the strike's duration. Of course, the absence of evidence to support that assertion is some support for a conclusion that cocounsel truly was unsure the accuracy of information being supplied during the investigation by Respondent. In any event, the statement accused Patrylak of having "conducted his own intermittent strike." Since Patrylak did strike, return to work and, then again resume striking, that accusation warrants consideration.

It is accurate that such conduct—striking, returning to work and striking again—has been characterized as "a partial or intermittent strike." See, e.g., *Farley Candy Co.*, 300 NLRB 849, 849 (1990). Even so, the Board has never even indicated that that shorthand definition is intended to encompass the one-time sequence of events where an employee strikes, changes his mind and returns to work, but then again changes his mind and resumes striking. To the contrary, both the Board and Circuit Courts of Appeals have referred to "repeated" or "recurrent or intermittent" refusals to work when describing statutorily-unprotected intermittent strikes. See, e.g., *Graphic Arts Local 13-B (Western Publishing Co.)*, 252 NLRB 936, 938 (1980); *NLRB v. Robertson Industries*, 560 F.2d 396, 398 (9th Cir. 1976); *Roseville Dodge, Inc. v. NLRB*, 882 F.2d 1355 (8th Cir. 1989).

There is no evidence here that there had ever been a preconceived plan by the Union and its supporters to engage in a series of strikes to harass Respondent. See, e.g., *NLRB v. Blades Mfg. Co.*, 344 F.2d 998, 1005 (8th Cir. 1965). Of the employees whom the Union sought to represent, most went on strike on August 30 and remained on strike. A few eventually returned to work, but, save for Patrylak, they remained working and did not again join the strike. There is no evidence allowing even some sort of inference that when he said on August 31 that he was returning to work, Patrylak had intended to work only for a day and, then, resume striking. That is, so far as the evidence reveals, his intention to return to work had been genuine. Certainly, there is no evidence that the Union had put him up to returning to work, nor that it had played a role in his decision to resume striking. Moreover, there is no basis for concluding that Patrylak's decision to resume striking had not been one genuinely formulated after he had worked on September 1.

Had Patrylak attempted to return to work after September 2, when he returned to the picket line, there would be some basis for concluding that he truly had been "conduct[ing] his own intermittent strike." But, there is no evidence that he ever did so. His changes in mind—to cease striking and return to work, then to cease working and resume striking—shows no more than his uncertainty about striking, an uncertainty not uncommon among employees. See, e.g., *NLRB v. Curtin Matheson Scientific, Inc.,* supra. It does not serve to deprive his strike-activity of the Act's ongoing protection.

If Patrylak did not attempt to return to work after September 1, he did return to its building on Friday, September 3. That was to pick up his paycheck from Service Manager Maus. However, Maus was not there. So, as he and other employees had ordinarily done whenever Maus was absent, Patrylak went to the desk of dispatcher Al Sizemore. The General Counsel and Union contend that at all material times Sizemore had been a statutory supervisor and agent of Respondent. Respondent denies those contentions.

Sizemore never appeared as a witness, though there was neither representation nor evidence that he was not available to testify. Thus, uncontradicted is Patrylak's testimony about what had been said after he said that he wanted to pick up his check and asked Sizemore where Maus was. Sizemore replied that Maus was not there and offered to get Patrylak's paycheck. He left and, after a minute or two, returned with the check. Sizemore asked where Patrylak had been during the previous day, September 2. Patrylak responded that he had gone back outside to the picket line. Sizemore retorted that this would be Patrylak's "last" check and that Patrylak had been fired, "like the rest of them outside." Patrylak asked who had said that to Sizemore. Sizemore answered that Taylor had said that. Patrylak asked to speak with Taylor. Sizemore said that Taylor was not present at Respondent and told Patrylak to leave the premises or the police would be called. Patrylak left.

That conversation has led the General Counsel to advance two allegations. First, it is alleged that Respondent had violated Section 8(a)(1) of the Act, because Sizemore had unlawfully threatened an employee with discharge to discourage employees from engaging in a work stoppage. Second, it is alleged that, by virtue of what Sizemore had said, Respondent had actually discharged Patrylak on September 3 for engaging in concerted protected activity—striking—and to discourage other employees from doing so. Those allegations, as well as Sizemore's alleged supervisory and agency status, are discussed in section II, infra. At this point, further discussion of the Patrylak-Sizemore September 3 conversation is confined to the factual question of what had been said.

Inasmuch as Sizemore was never called as a witness, the statements attributed to him by Patrylak are uncontested. Taylor denied that Patrylak had been terminated—in fact, Patrylak was a recipient of one of Respondent's September 30 preferential hiring list letters, discussed below—and, moreover, denied that he had at any time indicated to anyone that Patrylak was terminated. Taylor also testified that Sizemore lacked authority to terminate anyone without his (Taylor's) permission. Of course, it is undenied that Sizemore had said on September 3 that it had been Taylor who had said that Patrylak was fired. Furthermore, Taylor never denied that he had been at Respondent on September 3. So, it is not implausible that, after being informed of Patrylak's presence to pick up his check, Taylor had instructed Sizemore what to say to Patrylak, the statement that Taylor was not at Respondent being only advanced by Sizemore to shield Taylor from having to speak with Patrylak.

In any event, though sometimes becoming confused as he testified, but to no greater extent than employees have displayed when called upon to become witnesses, Patrylak appeared to be an honest individual who was attempting to testify truthfully. I credit his description of what he had been told by Sizemore on September 3. Independently of that credibility determination, it should not be overlooked that Patrylak's testimony tends to be corroborated by the portion of the September 24 statement of position quoted in subsection A above: that Respondent had decided "to lock out Patrylak" for "conducting his own intermittent strike," and that Sizemore had "told Patrylak that he had been terminated," but that Sizemore "had only been instructed to deliver Patrylak his final paycheck." Unexplained is what possible inference other than termination could be drawn from the phrase "final paycheck"—one which naturally conveys a message of farewell.

As pointed out in subsection A above, Respondent admits in its answer that on September 29 the Union and eight named striking employees had entered Respondent's facility where they made unconditional offers to return to work on behalf of all striking employees. That admission eliminates need to describe in full what had occurred that day, when the offers were made. Still, it is alleged that, in response, Nocera had told the employees present that they had been fired, thereby leading the General Counsel to allege that Respondent further violated Section 8(a)(1) of the Act.

Respondent denied that allegation. Nocera testified that, on September 29, he had been, understandably, "taken back" by the abrupt entry of Union officials and striking employees, accompanied by at least one of the two police officers then on duty at Respondent. He testified that, in response to the unconditional offers to return to work, he had told Union Secretary-Treasurer Hancock, "I'm not in a position or don't have the authority to make that decision," and, accordingly, "You need to talk to our attorney." To that, Nocera further testified, Hancock retorted, "So, what you're telling us is we're all fired," but he (Nocera) protested, "No, that's not what I'm telling you. What I'm telling you is you need to talk to our attorney." When Hancock repeated, "So what you're telling me is we're fired. Okay, we're all fired," Nocera testified that, "I said, 'No, that's not what I'm telling you. What I'm telling you is, you need to talk to our attorney.' And they left."

In testifying to that sequence of events, it was obvious that Nocera was attempting to portray Hancock as trying to maneuver him (Nocera) into a position where the Union could later allege that Respondent had fired the striking employees. In fact, one would have to be naïve to preclude that possibility, as an objective matter. Obviously, the situations of the striking employees would be enhanced, from Hancock's point of view, had a statutory supervisor and agent of their employer said that those employees were fired. Yet, an alternative conclusion is more plausibly reached by a review of the testimony of the three Union officials and striking employees who testified about the words exchanged that day.

As the strike had progressed toward the end of September, the Union's officials began talking among themselves about possibly having the striking employees offer to return to work. After conferring with counsel, those officials met on September 29 with the employees who were present that day on the picket line. After the situation was discussed, those employees agreed to make offers to return to work. So, the Union's officials and the striking employees, accompanied by at least one of the two police officers then on duty, approached Respondent's building. Secretary-Treasurer Hancock estimated that it had then been "approximately 3:45 in the afternoon"; porter Dove placed the time as having been "about 4:30."

It is not contested that while Nocera had been the only person to speak with the group of union officials and striking employees, he was not alone in the area. Chiarito testified that he had seen Maus in the area. Similarly, Business Agent Avalos testified that he believed the service manager had been present. Hancock testified that "someone from the service department" had been present. Nocera never denied that Maus had been in the area that afternoon when the group arrived at Respondent's building. Nor did Maus.

Porters Dove and Chiarito and Union Agents Avalos and Logan each testified that Nocera had asked what the group was doing there. When Nocera was informed that the striking employees were offering to return to work,10 detailer Patrylak testified that Nocera had re-

[10] Detailer Pollastrini testified that, in the course of making his offer to return to work, he had said "[w]e really don't want to," or "I don't want to be here," or "I really don't want to be here." However, he testified that he had also said that he was applying to return to work and there is no evidence that any other striking employee had made a like or

torted, "[N]o, we don't want any of you back. You've all been replaced." Other employees described a more final response by Nocera.

Pollastrini testified that Nocera had said that the striking employees no longer had jobs. Parts department driver Dybas testified that Nocera had said, "[W]e were no longer employees there" or "we were not workers there," and porter Dove testified that Nocera had said, "[W]e were all fired" or, perhaps more accurately, in Dove's opinion, "your jobs are no longer here." Chiarito testified initially that Nocera had said, "we were all f—king fired." During cross-examination it was pointed out to Chiarito that no such response had been attributed to Nocera in Chiarito's prehearing affidavit; instead, that the affidavit read only that Nocera had said, "We had no business there and we were no longer employees." In the end, Chiarito appeared to be testifying that what Nocera had said was "something along the lines that we no longer had jobs here," similar to what Pollastrini, Dybas and, eventually, Dove described.

Each of the union agents described Nocera's statement in the same vein as had those above-named employees. Thus, while Avalos testified initially that Nocera had said, "[Y]ou guys are all fired," he testified later that what Nocera had said was, "You don't work here anymore." Hancock described Nocera as having said, "I don't want you here and they don't f—king work here," a description not inherently inconsistent with the account in his prehearing affidavit: that Nocera had said to the police, "get me [Hancock] and the strikers off the property that they were no longer employees of the dealership." Director of Organizing Logan testified that Nocera had retorted to the unconditional offers to return to work, "they're no longer employees of that dealership and to get out now."

At first glance it might seem that witnesses who attributed the word "fired" to Nocera were attempting to embellish upon his response to the unconditional offers to return to work. But, as described above, Nocera acknowledged that that word had been utilized during the September 29 exchange. Only he testified that it had been uttered during the exchange by Hancock. In fact, Hancock acknowledged having said that word. In his affidavit, he stated that, after Nocera's statement "that they were no longer employees of the dealership," he (Hancock) had "asked Mr. Nocera if they were fired." Hancock agreed when testifying that he had addressed that question to Nocera, in light of the latter's response to the offers to return, and, testified Hancock, Nocera had answered, "They are no longer employees of this automobile dealership. Get off the property."

Other witnesses agreed that there had been an exchange of words between Hancock and Nocera. Most, however, were unable to recall what their words had been. Still, Avalos testified that Hancock had said, "[T]hen they're fired?" or "does that mean that they're fire[d]?" But, Avalos did not recall what, if anything, Nocera had responded, other than having "asked the police to escort us off the property." Logan testified that, "I believe Mr. Hancock and myself asked Mr. Nocera, 'Are you telling us that they're fired?'" and that Nocera answered only, "I'm telling you to get out. You have no business here." Logan, Hancock and Avalos each testified that Nocera had directed them, during the exchange, to contact Respondent's counsel.

Vice President and General Manager Taylor denied that Nocera had authority to terminate an employee without Taylor's authorization. Yet, there is no allegation that Respondent had actually terminated all striking employees on September 29. Rather, the only allegation is that Nocera had "told employees they had been terminated because they had engaged in a protected work stoppage in support of the Union." Certainly that allegation finds support in the above-described testimony presented by the General Counsel, regardless of whether Nocera said the striking employees were no longer employees of Respondent, or no longer were working for Respondent, or that they no longer had jobs, or no longer worked here. Their accounts were not materially different—that the striking employees' employment relationship was severed—and appeared to be advanced with candor.

As pointed out above, the Union's officials agreed that Nocera had directed them to contact Respondent's counsel, as Nocera testified that he had told them, and, further, Hancock agreed that he had asked Nocera if the strikers were fired, as Nocera also testified. Yet, while he claimed that he had told Hancock that he was not saying that striking employees had been fired, in fact Nocera never denied with particularity while testifying that he had made on September 29 any of the above-quoted statements attributed to him by the striking employees and the union officials: that those employees were no longer employees of or workers at Respondent, that they no longer had jobs or no longer worked at Respondent. I conclude that, in fact, Nocera had made some statement to the effect that the striking employees no longer had jobs or no longer were employees of Respondent. The precise form of his statement is not so significant, given that any of the responses described by the General Counsel's witnesses conveyed the same message to the striking employees: that they would no longer be working at Respondent. I credit their accounts.

The fact that Nocera lacked authority to fire anyone without Taylor's authorization is not a significant consideration. The question is not what authority Nocera actually possessed, but instead whether employees could reasonably believe that Nocera was conveying to them the substance of a decision made not by Nocera, but by Respondent. There is no reason suggested by the evidence why they would not have believed what Nocera was saying. Surely Hancock believed Nocera; he asked bluntly if Nocera was saying that Respondent had decided to fire the striking employees. Faced with so blunt a question, it is not necessarily surprising that Nocera might seek to retreat from further discussion, and possibly from saying something that might injure Respondent's position, by saying that Hancock should contact Respondent's counsel and by directing the police to get the group of Union officials and striking employees off Respondent's premises, thereby putting an end to further discussion.

Taylor testified that all of the striking employees, save for Chiarito, had remained employees of Respondent since September 29. Some of them received letters, dated September 30, in which Taylor acknowledged the unconditional offers to return to work, asserted that there were no openings because "we hired some permanent replacements during the strike" and other positions had been filled by returning strikers, and stated that the strikers would "be placed on a preferential hiring list" for notification when openings arose. But, the only striking employee ever thereafter offered reinstatement was parts department driver Theodore Kalinowski and that offer was not forthcoming until December 23, shortly before the hearing in the instant matter was scheduled to begin on January 3, 2000.

In fact, the census report reveals that, by September 30, employees had been hired as porters, detailers, and drivers: porters Mike Kattaneh and Michael Askren on September 4, Brian C. Mayfield and George S. Miguel on September 8, Ivan A. Scianni on September 9, Michael Cagala on September 11, and Jason A. Collin on September 16; detailer Brian E. Graves on September 4; and, parts drivers James Arcudi on September 3, and Juan C. Carlin and Brian A. Wilkie on September 8. The fact is, however, that Respondent adduced no evidence regarding the terms under which any of those employees had been hired: no evidence of what had been said to any of those employees when hired and no evidence of what any of those employees had understood about his employment with Respondent.

The lone striking employee who was terminated was leading union-proponent Chiarito. In a letter to him dated September 30, Taylor stated as the reasons for that termination, "over the past several weeks we have received numerous complaints from customers and co-workers about your behavior while on the picket line," specifying "Physical threats toward co-workers" and "Repeated vulgar comments and threats directed toward our customers," one of whom said she had sworn out an arrest warrant against Chiarito. "As such you have damaged our reputation with our customers and created an intimidating workplace for our employees," the letter continues, "leaving us with no reasonable alternative but to terminate your employment . . . effective immediately."

Consistent with the reasons advanced in his September 30 letter, Taylor testified, "I made that decision based on complaints from customers. I made that decision based on complaints from employees about threats made to them." Yet, as discussed below, very little particularized

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similar statement to Nocera on September 29 about not really wanting to return to work. Apparently, Nocera never paid attention to what Pollastrini was saying, for Nocera made no mention of it when testifying about the events of September 29. In any event, Respondent obviously regarded Pollastrini as having made a valid unconditional offer to return to work on that date. For, as described below, it sent Pollastrini one of its September 30 form letters in which it acknowledged his unconditional offer to return to work and said that his name was being placed on a preferential return-to-work list. Thus, whatever Pollastrini said about not truly wanting to return to work, his remark does not detract from the fact that Respondent had regarded his offer to return as a valid, unconditional one.

evidence was adduced to support those generalized assertions of complaints by customers and nonstriking employees about Chiarito. That is, the adjective "numerous" is misplaced in view of the specific evidence presented by Respondent. Beyond that, as had Chiarito occasionally, Taylor embellished on his letter's accusations. He testified, "I made that decision based on my own personal experience of leaving the dealership and having Mr. Chiarito, on numerous occasions, in my window cursing at me." Yet, that is not an accusation included in Taylor's September 30 letter. Further, had that been ongoing conduct by Chiarito, it was never captured on film as a result of Respondent's ongoing photographing and videotaping. Seemingly, had Chiarito been making a practice of being "in [Taylor's] window cursing at" Taylor, as the latter was leaving work, then surely it would have been a relatively easy matter for Respondent to station Maus, Miller or some other supervisor with a camera or video camera near the exit to film Chiarito at the side of Taylor's car and, beyond that, to capture Chiarito's words on the acknowledged recording capability of the video camera.

The absence of such particularized evidence might not be accorded great significance in other contexts. Here, however, there were other aspects of Taylor's testimony which rendered even more suspect his claims that Chiarito had been "cursing at me." According to Taylor, that "cursing" had included such phrases as "F—k you" and "Asshole." "I mean probably more," testified Taylor during direct examination, but he did not specify any other names. Yet, during redirect examination, he added that, while on the picket line, Chiarito had uttered words such as "scab, f–gg–t, pu—y, tough guy, and let me give you a kiss, honey." That effort to shore up Respondent's case against Chiarito during redirect examination was the result of certain aspects of cross-examination of Taylor. But it resulted in inconsistencies between Taylor's answers during cross-examination and during redirect examination.

As pointed out in the immediately preceding paragraph, Taylor agreed during redirect examination that pu—y had been an example of a word used by Chiarito while picketing. Problem there is that, during cross-examination, he was asked if that had been a word that he had heard the picketers—one of whom, of course, had been Chiarito—using. "Don't know if I heard that word or not," answered Taylor. "No," Taylor then answered, he did not recall hearing that word being used by picketers. Similarly, asked about the word honey—also a word which Taylor would later agree had been included in a phrase utilized by Chiarito while picketing—Taylor admitted during cross-examination that he did not recall having heard the word honey uttered by picketers. At no point did Taylor explain how during redirect examination he abruptly recalled Chiarito using those words which, during cross-examination, he either denied having heard picketers use or did not recall them using.

More importantly, if Taylor's testimony were to be credited, then he had heard picketers other than Chiarito uttering words which he regarded as vulgar and offensive. He agreed that Chiarito had not been the only picketer who had assertedly resorted to such words. Yet, so far as his testimony reveals, Taylor did not notice which other picketers had purportedly uttered the same words which he regarded as offensive when uttered by Chiarito. Certainly that was not because Taylor had not known the identities of those other purportedly foul-mouthed striking employees. "I know who they are pretty much," he conceded when asked if he knew the identities of strikers employed by Respondent. He acknowledged that he could recognize them by sight. True, there were many picketers in addition to those who were employees of Respondent. But, Taylor never claimed that utterance of profane, obscene and otherwise offensive words had been confined to persons other than striking employees of Respondent, save for Chiarito. So far as his testimony shows, use of that language was supposedly attributable to other striking employees of Respondent. To conclude otherwise would be to improperly construct a defense that Taylor never advanced. Yet, only Chiarito was singled-out for termination because of his purported use of profane, obscene and otherwise offensive language.

As pointed out in subsection D above, when the police had arrived at Respondent on August 30, certain rules were imposed on the picketers. One of them was a prohibition on vulgarities and obscenities. It cannot be inferred that violations of that particular prohibition went unnoticed by police officers stationed at Respondent on a round-the-clock basis. As mentioned in subsection E above, an investigative report of September 8 recounts the use of "abusive language" by "several of the demonstrators," and on September 11 an LO was issued to a Machinists business agent for use of offensive language. So far as the evidence shows, police officers were on alert for use of vulgar and obscene language by picketers. However, there is no evidence of an LO having been issued to Chiarito for use of vulgar and obscene language—which, certainly, is a fair characterization of some of the words that Taylor claimed Chiarito had used—nor is there even any investigative report recounting use of vulgar or obscene language by Chiarito.

As he testified, Taylor appeared to be attempting to adjust his accounts about Chiarito so that the latter would be portrayed in the most unfavorable light possible, regardless of actual situations which Taylor was being asked to describe. The considerations covered in the preceding paragraphs provide objective illustrations which support that impression. Additional examples of an effort to construct a case against Chiarito—one that would supply a legitimate, if not truly supported, defense to his alleged unlawfully motivated discharge—are supplied by the superficial evidence of a few customer complaints involving a picketer named "Mike," by the absence of any photographic evidence of misconduct by Chiarito, and by the unreliability of the lone employee who attempted to attribute misconduct to Chiarito.

Discussed in subsection E above is Andrea Johnson's handwritten account of supposed harassment by, inter alia, a picketer named "Mike." There were three striking employees of Respondent whose first name is Mike: Chiarito, Dove, and Dybas. Of those three, however, Chiarito fits generally the description written by Johnson: "a white male, approximately 5'9" and between 175–185 pounds." Nonetheless, there had been a relatively large number of picketers who participated in the strike at Respondent. Michael is not an uncommon name. Not only is that the first name of nonstriking employee Michael K. Hughes, but it is the middle name of irregularly employed A. Michael Zolfo and the first name of former employee Michael S. Lounsbury, as well as the first name of post-August 30 hires Kattaneh, Askren and Cagala. Respondent has presented no evidence that none of the picketers who were not its employees did not have a first or middle name of Michael. That is not so insignificant an omission as might be the fact had Johnson appeared as a witness and identified Chiarito.

Seemingly, it would have been a relatively easy matter to have called Johnson to positively identify Chiarito, had he truly been the "Mike" to whom she referred. There was neither evidence nor representation that she was not available to testify. Nor can it be inferred that she would have been reluctant to be a witness, given the tenor of her handwritten account and her calls to the Orland Park Police Department in pursuit of the harassment that she claimed to have suffered at the picket line. Yet, as to Johnson, the record is left with no more than a handwritten complaint by someone neither made available for cross-examination nor whose demeanor was subject to evaluation when she made her harassment assertions. In fact, had Johnson appeared as a witness, there is every indication that she would not have fared well as a witness.

Not only was her handwritten account of what, inter alia, "Mike" had said and done, on September 11, contradicted by the seemingly candid testimony of Patrol Officer Siewert. In addition, the latter's account shows that any controversy involving the Johnsons on that Saturday had been provoked by Johnson's husband. Certainly, Johnson was not the lone individual to make a false complaint against picketers. As also described in subsection E, Detective "PRATL" had been present during a September 16 incident when a nonstriking employee, perhaps Finance and Insurance Manager Koleno, had falsely claimed that he had been called a vulgar name by a picket, and Pratl disputed that employee's account. And on September 21 a salesman wanted to file complaints about rocks possibly being thrown at cars on the lot when, in fact, neither damage to cars nor rocks were located during or after the inspection of the lot.

Those events raise a natural suspicion about the reliability of customer- and employee statements produced by Respondent, to support its claims of misconduct by picketers, particularly by Chiarito. Nonstriking employees were not likely sympathetic toward employees who had gone on strike, given the disruption of Respondent's business and the names, such as scab and loser, which those nonstriking employees were being called. Every strike is regarded with some disagreement, if not hostility, by at least some customers. In fact, some of the statements produced by Respondent contained generalized characterizations which did not truly correspond to the specific descriptions contained in the them. Most importantly, from the perspective of the allegation regarding Chiarito's discharge, is the statement of Tanya Love.

Her statement asserts that "a younger guy named Mike" had been one of two picketers who had been "calling me names" on September 15. "Mike" was never described in the statement by Love. Given the number of Mikes actually picketing, and the distinct possibility that there may have been others with that first or middle name, there is no basis for necessarily attributing any of Love's accusations to Chiarito, as opposed to Dove or Dybas or, perhaps, some other picketer named Mike. As with Johnson, Love never appeared as a witness to identify Chiarito,

had he truly been the "Mike" to whom she referred, and there was neither evidence nor representation that Love was not available to testify.

The only "names" recited in Love's statement are scab and loser, both names encompassed by the protection of the Act in strike situations, under the decisions cited in subsection E above. Even if the "older gentleman" picketer, as Love described him, truly had said that "he hoped [Love's] car blew up," such a remark was not attributed by her to "Mike" and, moreover, that other picketer's remark cannot be attributed to other picketers who were with him, such as "Mike." A striking employee is not obliged under the Act to take affirmative action to disavow improper conduct by another picketer. *Beaird Industries*, 311 NLRB 768, 770 fn. 8 (1983). Nor, it is long settled, is a striking employee obliged under the Act to abandon his/her own protected activity because another picketer engages in misconduct. See, e.g., *Ladies Garment Workers v. NLRB (B.V.D. Co.)*, 237 F.2d 545, 550–551 (D.C. Cir. 1956). Thus, even had the older picketer said that he hoped Love's car blew up, and even had such a remark constituted strike misconduct under the Act, that would not be a statement which could be attributed as well to "Mike" who, after all, appears to have been no more than a bystander with respect to that particular remark by another picketer. There is no evidence that "Mike" ever endorsed such a remark.

Other evidence of asserted strike misconduct by Chiarito was the portion of the excerpted videotape taken on September 28, showing a picketer—whom Taylor claimed was, but who cannot truly be identified as, Chiarito—bouncing around behind a police car in the 159th Street entrance to Respondent. But, that conduct cannot be said to have impeded traffic. The patrol car was already parked in the entrance lane. There is no evidence that Chiarito, or whoever was bouncing around behind it, was impeding the policeman-driver from backing out of the entrance. In fact, there is no indication from the videotape excerpt that the officer ever had wanted to back out. To the contrary, he appears to be talking to someone. In any event, the picketer's conduct was brief in duration. Still, there were certain other incidents which require additional evaluation in connection with Chiarito's discharge.

As pointed out in subsection E above, Chiarito had been arrested on September 9. But, he was released from custody shortly afterward, though he was issued an LO for the conduct which had led to his arrest. Still, Taylor never claimed that he had known about Chiarito's arrest before September 30. An account of it is included in one of the police reports which Respondent obtained from the Orland Park Police Department. But, Taylor admitted that those reports had not been received by Respondent until after September 30, on some day during mid-October. Thus, it cannot be said that by September 30 Taylor had learned of the arrest from the police reports and, beyond that, there is no evidence that he had learned of it from any other source prior to September 30. In fact, neither in his letter to Chiarito of that date nor during his explanation of his reasons for deciding to terminate Chiarito did Taylor include that arrest and resulting LO as a reason for having decided to fire Chiarito. In consequence, under the after-acquired evidence doctrine, "such evidence [is] *not* relevant to the employer's liability," *Nieves-Villanueva v. Soto-Rivera*, 133 F.3d 92, 101 (1st Cir. 1997), and, more specifically under the Act, "would not have been a basis for discharge." *Tel Data Corp. v. NLRB*, 90 F.3d 1195, 1199 fn. 5 (6th Cir. 1996).

Furthermore, while arrested for actions engaged in while striking, no violence had been involved. Chiarito had not been arrested for some type of conduct directed at a customer or a nonstriking employee nor, even, for conduct directed at Respondent. He had been arrested for failing to observe a police-imposed safety rule. That is, he had been arrested for "leaning out towards the street, blowing a whistle and then yelling at passing vehicles" on 159th Street. Police-imposed restrictions on place and time of picketing, not involving blocking ingress and egress to the struck employer's premises, are not covered by the Act. That is, neither the Act nor the Board have imposed restrictions on proximity of picketing to municipal thoroughfares, nor on what types of actions picketers can direct at traffic on those thoroughfares, again so long as ingress and egress to a struck employer's premises are not blocked or impeded unreasonably. Given the nature of those reasons for Chiarito's arrest and LO, there seems no reason for characterizing the conduct that led to his arrest as misconduct sufficient to allow Respondent to bar him from return to work. In any event, that conduct was not a reason advance by Respondent for firing Chiarito and, further, could not be a reason, since there is no evidence that Taylor knew about it before October.

As pointed out above, in his September 30 letter, Taylor asserted that there had been "numerous complaints from . . . co-workers about [Chiarito's] behavior," and, while testifying, Taylor claimed that there had been "complaints from employees" about Chiarito. In fact, however, Respondent presented particularized evidence of but a single employee who had complained about Chiarito. That was porter Jason Patt who, as discussed in subsection B above, had given testimony about the circumstances of signing his authorization card that was not consistent with any evidence concerning how the cards had been signed—testimony that he appeared to believe would injure the Union's position. No less reliable was his testimony about purported threats by Chiarito and about supposedly having been followed by Chiarito as he (Patt) was driving home on September 29.

Patt testified that during two separate conversations Chiarito had said that he would kick Patt's ass if the latter abandoned the strike and returned to work at Respondent. On September 28, the day before he returned to work, Patt signed a statement for Respondent, reciting those asserted statements by Chiarito. As he testified, however, Patt appeared to making an effort to embellish on his initial accounts of what Patt had said on the first of those two separate occasions. In the end, moreover, he attributed an entirely novel act of misconduct to Chiarito.

According to Patt, the first purported conversation with Chiarito had occurred early during the strike, on approximately September 7 after the technicians had abandoned their strike against, and returned to work for, Respondent. Patt testified that he had started thinking about doing likewise and that Chiarito must have somehow learned about what Patt was thinking. He testified that Chiarito asked if what he heard was true and Patt replied that he was thinking about returning to work. When he first described the conversation, Patt testified that Chiarito had retorted, "That he'd kick my ass" if Patt did return to work. Shortly afterward Patt added that Chiarito had "said, well if you go back to work, then I'm going to kick your ass or, you know, we're going to hurt you or do this and that." Of course, that is a much stronger warning than initially described by Patt. But, in the written statement which he had signed, Patt stated that Chiarito had said that if he returned to work, Patt would "get my ass kicked by him (Mr. Chiarito)."

So far as the evidence shows, Patt had never reported to Respondent anything about a threat to "hurt" Patt, nor to "do this and that." Asked specifically if Chiarito had said "this and that," Patt began to retreat somewhat, answering, "Yes. He said he was going to kick my ass." Eventually Patt fully retreated from his additions of the supposed "hurt" and "this and that" remarks by Chiarito. For, he admitted that Chiarito had said no more than that "he'd kick my ass. That's, specifically, what he said. That's all he said." At no point did Patt explain why he had added the "hurt" and "this and that" elements to his account. It appeared that, in an effort to aid Respondent in portraying Chiarito in the most unfavorable light possible, Patt had chosen to embellish his description, but had to eventually retract those embellishments.

The second such purported statement by Chiarito, testified Patt, had occurred about a week or two before he returned to work on September 29, on September 20 according to the written statement that he had given to Respondent. That statement recites only that while picketing that day, Chiarito had said that he heard that Patt might return to work and that, if Patt did go back to work, Chiarito would kick his ass. Nonetheless, Patt also made some adjustments to that account as he was testifying. Rather than while picketing, Patt testified that picketing had ended for the day and that he and Chiarito had been standing with two other picketers—Katzberger and Mataczynski—by Mataczynski's car, discussing the possibility of "going out that night" to, "Have some fun." During that conversation, according to Patt, Chiarito had asked if Patt was "planning on going back to work," and Patt responded that maybe he would return.

Initially Patt testified that Chiarito merely had "said that he didn't want me to go back to work. That, they'd kick my ass or he'd kick my ass if I went back to work," to which Patt testified that he had replied, "I don't know. I'll make up my mind." Later Patt added to that account of what Chiarito had said: "He said, I really don't want you to go back to work, you know. He's like, this is stupid. We're almost done. We're going to get this. We're, this is all going to work out. We're going to get out contract signed. We're going to go, all going to go back to work for a day or whatever." None of those asserted remarks had been included in Patt's written statement. Nor had they been included in his above-quoted initial description of what Chiarito purportedly had said. As it turned out, those were not the only additions supplied by Patt as he testified.

As, in effect, cross-examination progressed it appeared to dawn on Patt that one object of that questioning was aimed at minimizing the effect on him of whatever Chiarito had said. When asked if Chiarito ever approached him after he had returned to work, Patt testified only,

"They yelled at us when we drove out. And they approached our car and screamed at us when we drove out. That's about it." But, for Patt, that was not "about it" as he faced further questioning.

Patt again was asked about interactions with Chiarito and, at that point, Patt answered, "Once." He then proceeded to describe an incident when "Mr. Chiarito, Mr. Steve somebody, Brad. I believe that's all that was in the car. They followed me home in my car." According to Patt, at least at that point in his testimony, "they came up on the side of me and started screaming at me out their window," screaming, "Stop, pull over." At that point in his testimony Patt seemingly was portraying himself as having been alone in his car. However, further examination led him to answer that Chiarito "tried to get *us* to pull over." (Emphasis added.) That use of the plural was no slip of Patt's lip. Later he testified: "He followed me in someone's car and tried to get *us* to pull over," (emphasis added) and, still later, "Like the day we went back, right when *we* left that dealership, they were on *our* ass following *us* home. On my ass driving where I was driving." (Emphasis added.)

Patt never explained to whom "us" or "we" or "our" referred. No other witness appeared and corroborated his description of an asserted following incident. Moreover, Katzberger and Patt appeared to have returned to work on the same day. But, though he appeared as a witness, Katzberger never claimed that he had left work with Patt on any day after returning to work. And Katzberger never claimed that he had been followed home by strikers. As the last quotation in the immediately preceding paragraph shows, Patt placed the asserted car-following incident on "the day we went back," which would have been September 29. As set forth above, that also had been the day when striking employees had entered Respondent's building, and made unconditional offers to return to work, between 3:45 and 4:30 p.m. At that time, though not by the dates of the hearing, Patt had been getting off work at 5 p.m. Which means that to accept Patt's car-following testimony, Chiarito and at least two others would have had to leave Respondent's building, following the above-described exchange with Nocera, jumped in Chiarito's car and begun following Patt, as the latter was leaving work.

As an objective matter, that is not a totally implausible scenario. Anger at having their offers to return rebuffed could have motivated one or more strikers to retaliate against a former striker who had been allowed to return to work. In the circumstances here, however, such a scenario is not a probable one.

Regardless of Nocera's answer, it seems that the strikers had not left Respondent's building, after making their unconditional offers, with no hope whatsoever that they would not be allowed to return to work with Respondent. After all, that was a decision to be made by Taylor and, while Nocera might be speaking for Respondent, Taylor had not yet been heard from. It still was conceivable that Taylor, upon learning of the unconditional offers to return, would decide to allow all the striking employees to return to their jobs. Their ability to return to work was an issue not yet resolved absolutely. Given that ambiguous situation, it seems most unlikely that Chiarito or any other striking employee would be disposed to engage in some type of conduct that might prejudice their ability to be able to return to their jobs. After all, activities such as tailgating and swerving in front of, or near, a nonstriker's vehicle have been held to constitute strike misconduct. See, e.g., *NLRB v. Otesgo Ski Club*, 542 F.2d 18 (6th Cir. 1976); *Firestone Tire & Rubber Co. v. NLRB*, 449 F.2d 511 (5th Cir. 1971); *Associated Grocers of New England v. NLRB*, 562 F.2d 1333 (1st Cir. 1977). Even had Chiarito and other striking employees not fully appreciated those consequences of such conduct, the Union's officials were experienced individuals. It seems most unlikely that they would have not have counseled the striking employees to refrain from such conduct as Patt claimed had occurred late that afternoon.

As another objective matter, there was nothing about Patt's status that would have made him a natural target of retaliation for having returned to work at Respondent. There is no evidence that he had been some kind of leading union activist whose abandonment of the strike might be resented by employees remaining on strike. Nor is there any evidence that he had been some type of dissident during the strike, one who had regularly dissented from the actions which other strikers were anticipating or conducting. Other striking employees—Bradley Turk, Patrylak—had abandoned the strike and returned to work without having suffered any retaliation by striking employees, at least so far as the record shows. There seems no reason for Chiarito or any other striking employees to follow a contrary course upon discovering that Patt had returned to work. Certainly there is no basis for concluding that Patt and Chiarito had been so close that the latter might particularly resent the former's abandonment of the strike. Patt admitted that he and Chiarito had not been close friends during or before September. In sum, there is simply no objective basis which would support a conclusion that it had been logical for strikers to single-out Patt for harassment, after he had abandoned the strike and returned to work.

Chiarito denied expressly that he had engaged in any car-following of Patt. Patt's testimony about such an incident did not arise when he was interrogated by Respondent about asserted misconduct by Chiarito; instead, it arose belatedly and only after it seemed to appear to Patt that his descriptions of supposed threats by Chiarito were being diminished by his own answers to questions about his reaction to those supposed threats. In fact, his testimony about the purported car-following was given after he had initially testified that the only times after returning to work when he had been approached by Chiarito were "when we drove out. That's about it." The latter testimony contradicts his own later-supplied testimony about Chiarito's purported car-following; Patt never did explain the internal contradiction which resulted. Beyond that, as pointed out in subsection B above, Patt appeared to be attempting to testify in a manner that would favor Respondent. Given the circumstances of his own return to work, that attitude is not necessarily surprising.

Patt testified that, after having decided to offer to return to work, he had spoken with Maus by telephone and had offered to return to work. Maus never testified about that conversation, so the account by Patt remains the only evidence of what had been said. According to Patt, following an exchange of small talk, he had said that he wanted to return to work, but Maus did not immediately agree to allow Patt to return. Instead, testified Patt, Maus had promised to "give me a call a couple days later, and he did." During that conversation, Patt testified that Maus "said that he wanted to meet with me and have a talk eye to eye, face to face and see what I really felt about the job and what I felt about the strike." And Maus also said, Patt further testified, that cocounsel for Respondent would be present during that talk and, further, that Taylor might also be present.

By the time of that conversation, two other unit employees—Turk and Patrylak—had been allowed to return to work, albeit for a short duration in Patrylak's case. Furthermore, all of the striking technicians or mechanics had been allowed to return to work. There is no evidence whatsoever that any one of those strikers had been obliged, as a condition of returning to work, to submit to a meeting with an statutory supervisor and cocounsel for Respondent. Nor is there any evidence that Katzberger, who returned at the same time as Patt returned to work, had been required to attend such a meeting before his offer to return had been accepted. Obviously, Patt was being singled-out for different treatment and it is likely that an employee in such a position would come to believe that he had to do more than simply offer to return, in order for his offer to be accepted. In fact, Patt testified that he had agreed to sign a written statement for Respondent "to help me go back to work."

It had been during that meeting with Maus and cocounsel that Patt claimed that Chiarito had twice threatened to kick his (Patt's) ass and, in addition, had signed the written statement describing those supposed statements by Chiarito. If nothing else, surely Respondent's effort to memorialize those supposed statements in writing alerted Patt that Respondent was at least interested in possible misconduct by Chiarito. Given that awareness of Respondent's desire, it seems that Patt would have realized that a later car-following incident, had it truly taken place, would similarly be of interest to Respondent. In fact, Patt did claim at one point that he had told "my boss" about the asserted car-following incident. Yet, that seemed nothing more than an added example of Patt's willingness to tailor his testimony so that it would seem plausible.

Patt never identified whom he meant by "my boss." Presumably, it referred to Maus, but it could also have referred to Taylor. In any event, Maus had been present at the recently conducted meeting during which a written account of Chiarito's purported threats had been prepared and, then, signed by Patt. Surely, had Patt truly reported the asserted car-following incident to him, Maus would have realized that Respondent would be desirous of similarly memorializing in writing an account of even more flagrant conduct by Chiarito. But, Maus never testified that Patt had reported such an incident to him and, moreover, Maus never

explained why such a purported incident had not been reported to cocounsel or, at least, to Taylor. For his part, presumably Taylor was aware of the written statement obtained from Patt on September 28 and, accordingly, of the desirability of having written accounts of any additional purported misconduct by Chiarito. Yet, there is no evidence that Taylor made any effort to notify counsel of what Patt had reported to "my boss."

In sum, as he testified, it appeared that Patt was attempting to tailor his testimony to aid Respondent's position, in the process damaging that of Chiarito, rather than testifying truthfully. Given the uniquely-conducted meeting which he had been obliged to attend before being allowed to return to work, it would not be surprising for him to conclude that Respondent expected more of him, by way of testimony supporting its position, than it expected of other former strikers or nonstrikers. In any event, the supposed car-following incident was raised abruptly by Patt; it had not been mentioned by him when he was interrogated by Respondent concerning misconduct by Chiarito and it was mentioned only after Patt had testified that Chiarito had done no more than "yell" at him after he had returned to work. I do not credit Patt's description of that incident; it appeared to have been one constructed while Patt was testifying with the intention of buttressing Respondent's case against Chiarito, as Patt seemed to believe was expected of him.

Nor do I credit Patt's testimony about Chiarito having twice said that he would kick Patt's ass if the latter returned to work. True, unlike the car-following incident, Chiarito never effectively denied having made such a statement to Patt. Chiarito was asked only "Do you *recall* ever telling Mr. Patt that you would kick his ass?" (emphasis added), to which Chiarito answered in the negative. On its face, that is nothing more than a denial of recollection which "hardly qualifies as a refutation of . . . positive testimony and unquestionably was not enough to create an issue of fact between" Patt and Chiarito. *Roadway Express, Inc. v. NLRB*, 647 F.2d 415, 425 (4th Cir. 1981). See also, *Indian Hills Care Center*, 321 NLRB 144, 150 (1996). True, Chiarito did deny generally having threatened anyone during the strike and did deny generally having threatened any employee. Yet, under the principle discussed in subsection A above, as applied in subsection C above, such a general or blanket denial is not an effective refutation of specific testimony.

Nevertheless, as also discussed in subsection A, even undenied testimony need not be accepted if there is a reason for not doing so. As already concluded, Patt gave false testimony both in connection with the circumstances of signing an authorization card and with respect to car-following by Chiarito. Where a witness gives false testimony in one or more areas, it demonstrates a disposition to give similarly false testimony in other areas. As set forth above, the accusations that Chiarito had threatened to kick Patt's ass had been made during a meeting with Maus and cocounsel, as Patt attempted to return to work for Respondent. Patt seemed to be a fairly perceptive individual and, whether intended or not, Respondent had placed him in a position where, it seemed, Patt appeared to conclude that he needed to supply evidence against union supporters, specifically Chiarito, to succeed in returning to work. In sum, from his perspective, he had every reason to fabricate accounts of what Chiarito had said, in an effort to resume working for Respondent.

Given the totality of the foregoing considerations, I do not credit Patt's testimony about Chiarito's asserted threats to kick Patt's ass if the latter returned to work. Beyond that, even had Chiarito made such statements to Patt, I would not conclude that such a remark constitutes strike misconduct in the circumstances presented here. Such a statement is no different from the one made to picketers by Nocera on September 2, as described in subsection F above. There I concluded that such a statement, devoid of any violence or indication of threatened violence, was no more than rhetoric. In the circumstances here, no different conclusion is warranted.

II. DISCUSSION

In view of the resolutions in sections I.B through I.F, supra, left for resolution are the issues arising from the events described in section I.G, supra: the statements by Sizemore to Patrylak on September 3, the statements to striking employees by Nocera on September 29, the failure to allow strikers to return to work after their September 29 unconditional offers to do so, and the September 30 termination of Chiarito. In addition, remaining for resolution is the allegation that Respondent unlawfully failed and refused to recognize the Union on and after August 30, as well as the related remedial bargaining order request.

Turning first to Sizemore's September 3 statement to Patrylak, unlike Koleno, Sizemore does not attend managers' meetings, nor does he even have a title containing the word manager. His title is that of dispatcher. Possession of that title does not inherently mean that its possessor is a statutory supervisor. See, e.g., *B. P. Oil, Inc.*, 256 NLRB 1107 (1981), enfd. 681 F.2d 804 (3d Cir. 1982); *NLRB v. Joy Recovery Technology Corp.*, 134 F.3d 1307, 1313–1314 (7th Cir. 1998). As might be expected of someone titled dispatcher, Sizemore distributes to service employees the work which needs to be performed. In performing that function, however, there is no evidence that Sizemore exercises any true independent judgment, such as by prioritizing or assigning priorities to work, or by taking any actions which exceed or transcend guidelines set by Respondent for performing service department work. See *NLRB v. Meenan Oil Co., L. P.*, 139 F.3d 311, 321–322 (2d Cir. 1998). Regardless of whether employees believe him to be a supervisor, therefore, the evidence does not show that Sizemore utilizes independent judgment in the exercise of any one of the powers enumerated in Section 2(11) of the Act.

That conclusion leaves for resolution the companion issue of whether or not Sizemore might be an agent within the meaning of Section 2(13) of the Act. In the final analysis, there is no evidence that he is a general agent of Respondent. Most of the testimony about what he does during the day involved descriptions of work that he distributed to unit employees, a function which is no more than what might be expected of a dispatcher. Presumably, a dispatcher would make changes in work during the day to accommodate newly received work. So, the fact that Sizemore has made such changes does not, of itself, somehow demonstrate a general agency status.

There is no testimony that he ordinarily conveys information from Respondent to its employees. It is accurate that whenever an employee intends to be absent for the day—for illness or because of car trouble—that employees is required to call Maus and, whenever Maus is not present, would report to Sizemore that he (the employee) would not be coming to work that day. So far as the record discloses, however, Sizemore does no more than record what the employee has reported. There is no evidence that Sizemore exercises any sort of discretion in connection with receipt of such calls.

Even so, an employee can be concluded to have possessed a more limited agency status, such as when that employee communicates to coworkers a message that his employer has directed him to communicate to other employees. Of course, that would be similar to the special agency status that Chiarito had occupied with the Union when soliciting signatures on authorization cards, as discussed in section I.B, supra. On September 3 Sizemore said that he would get the paycheck that Patrylak was seeking. He returned with that paycheck, saying that it was Patrylak's last check and that Taylor had said to tell Patrylak that he was fired. To be sure, a purported agent cannot create his own agency. See, e.g., *Sonicraft, Inc.*, 276 NLRB 407, 413–414 (1985), and cases cited therein. But, Sizemore never appeared as a witness and Patrylak appeared to be testifying candidly. Accordingly, I conclude that, in fact, Sizemore had told Patrylak that the check was his last one and that Taylor had said that Patrylak was fired.

Taylor did appear as a witness. He denied that Patrylak had ever been terminated. He testified that Patrylak "is on the payroll," an assertion supported by his inclusion of Patrylak's name on the census report referred to in section I.C., supra. But, while he denied generally that he had ever indicated to anyone that Patrylak was terminated, Taylor never denied specifically that he had told Sizemore that Patrylak was discharged. And one other denial by Taylor should not escape notice. During direct examination, when he was being examined by friendly counsel, Taylor answered in the negative to the question, "Did you tell anyone to indicate to Mr. Patrylak *when he was given his last check* the status of his employment?" (Emphasis added.) In fact, "last" was the adjective which Patrylak testified that Sizemore had used to describe the paycheck handed to Patrylak on September 3. Furthermore, Taylor never denied having spoken to Sizemore about that paycheck on September 3, before the latter had taken it to Patrylak. And Taylor never denied having said to tell Patrylak that it was his last paycheck.

The agency issue involving Sizemore boils down to a very narrow one: had Sizemore on September 3 been authorized by Taylor to communicate a message to Patrylak about the paycheck? It is undisputed that Sizemore had communicated such a message to Patrylak. He said that it was Patrylak's last paycheck. Taylor never denied that that had been the message which he had authorized Sizemore to communicate to Patrylak. To the contrary, implicit in the underscored portion of the above-quoted question is the concession that Taylor actually had told Sizemore that the paycheck was Patrylak's last one. Indeed, Respondent agreed as much on page 3 of the now-disavowed September 24 statement of position, quoted in section I.A, supra. Regardless of the status of that position statement as an admission, it hardly seems likely that cocounsel had simply made up the entirety of what is recited in that position statement.

Instead, the logical inference is that the client had reported the events of September 3 to co-counsel, even though Respondent may not have been willing to later acknowledge during the hearing what had taken place four months earlier. I conclude that the evidence does establish that Sizemore had been Respondent's statutory agent, a special agent, for communication of the message to Patrylak about the paycheck given to the latter on that date.

It is undisputed that, in addition to saying that it was Patrylak's last paycheck, Sizemore also had said that Patrylak had been fired and that Taylor had said as much. Now, there is no evidence that Taylor had authorized Sizemore to make that additional statement. Nonetheless, having authorized Sizemore to communicate a message to Patrylak, there is some basis for attributing to Respondent responsibility for whatever Sizemore had chosen to add to the message which he had been authorized to communicate. "Whether specific acts performed were actually authorized or subsequently ratified is not controlling" (footnote omitted), *Sears Roebuck of Puerto Rico,* supra, 284 NLRB at 258, whenever an employer has placed an employee, such as Sizemore, in a position to actually speak for management. In the final analysis, however, that is not an issue that needs to be reached.

Even were it to be concluded that Respondent cannot be held responsible for Sizemore's firing statement to Patrylak, because such a statement exceeded the scope of the statement about the paycheck that Sizemore was authorized to communicate, the fact remains that Sizemore had been authorized to tell Patrylak that the paycheck was his last one. In determining whether or not a discharge has occurred, telling an employee that he/she is receiving a "final" paycheck has been held one indicia of actual discharge. See, e.g., *C & W Mining Co., Inc.*, 248 NLRB 270, 272, 273 (1980); *Pennypower Shopping News, Inc. v. NLRB*, 726 F.2d 626, 629–630 (10th Cir. 1984). Of course, "last" is no more than a synonym for "final," and is so understood in common parlance. Respondent has suggested no alternative meaning for use of the word "last." Certainly, it is fair to say that Sizemore had interpreted the word to mean that Patrylak had been fired; that is precisely what he told Patrylak that Taylor had said. Therefore, I conclude that a preponderance of the credible evidence establishes that Sizemore had been Respondent's statutory agent for communication of the message to Patrylak that the paycheck was his last one. Moreover, I conclude that such a message naturally conveyed, in the circumstances, the message to Patrylak that he had been terminated and, further, for no reason other than his return to the picket line, activity protected by Section 7 of the Act. In consequence, by making that statement to Patrylak, Sizemore effectively communicated that Patrylak had been fired for engaging in a strike, thereby violating Section 8(a)(1) of the Act.

Was Patrylak actually discharged on September 3? To answer that question affirmatively, there need not be evidence of formal or set words actually expressing discharge. See, e.g., *NLRB v. Cement Masons Local 555*, 225 F.2d 168, 172 (9th Cir. 1955); *NLRB v. Central Oklahoma Milk Producers Assoc.*, 285 F.2d 494, 497–498 (10th Cir. 1960). Rather, "the test is whether the actions of an employer would reasonably lead an employee to believe that he has been terminated." *Future Ambulette*, 293 NLRB 884, 893 (1989), enfd. 903 F.2d 140 (2d Cir. 1990). See also *Kinder-Care Learning Centers,* 299 NLRB 1171, 1175 (1990). That general test is no different in strike situations. "The test to be used is whether the [employer's] acts reasonably led the strikers to believe that they were discharged." *Apex Cleaning Service*, 304 NLRB 983 fn. 2 (1991), quoting *Brunswick Hospital Center*, 265 NLRB 803, 810 (1982).

As pointed out above, telling an employee that he is receiving his last or final paycheck is consistent with an actual discharge. Taylor never explained that he had intended any other meaning by telling Sizemore that it would be Patrylak's last paycheck. Sizemore certainly seems to have reached the conclusion that Taylor meant by that phrase that Patrylak was being terminated. At the very least, use of that phrase creates an ambiguous situation, in which an employee could naturally conclude that he was being fired, by being told that he was receiving his last paycheck. Of course, "the burden of the results of that ambiguity must fall on" Respondent. Id. That discharge of Patrylak had been Respondent's intention is shown by certain subsequent events, as well.

Although Patrylak was eventually sent one of the September 30 letters about being put on a preferential list for return to work, that did not occur until almost a month after he had been told that he was receiving his last paycheck. During the interim, Respondent was made aware that Sizemore's statements to Patrylak had given rise to a genuine belief that the latter had, in fact, been fired. On September 9 the Union filed a first amended unfair labor practice charge in Case 13–CA–38061. In it, the Union alleged, *inter alia*, that Respondent "[d]ischarged its employee Brad Pawlack [sic] because he supported [the Union] and for other protected activity." So far as the evidence discloses, Respondent made no response to that allegation until its cocounsel submitted the September 24 statement of position. Thus, between receipt of the amended charge and September 24 Respondent "never retracted or disavowed," *Cargill Poultry Co.*, 292 NLRB 738, 739 (1989) the impression of discharge created by Sizemore on September 3—never informed Patrylak that he was not fired, never informed the Union that Patrylak had not been fired. Moreover, so far as the record discloses, Respondent did not send a copy of its September 24 statement of position to Patrylak, nor to the Union. Nor, on that date or on any later date, did it notify either the Union or Patrylak that the latter had not been terminated on September 3. In short, through September 29 all objective considerations known to Patrylak left him to logically conclude that, in fact, he had been discharged.

To be sure, the September 30 letter was some expression to Patrylak of Respondent's willingness to allow him to return to work. But, it never thereafter offered him the opportunity to do so. There had been three detailers who initially went on strike. One of them, Bradley Turk, returned to work. Brian E. Graves was hired on September 4 as a detailer. There is no evidence that the third detailer position had been filled by September 29 when Patrylak and other striking employees made unconditional offers to return to work. In consequence, as of September 29, so far as the record shows, there had been a vacant detailer position. But, there is no evidence that Patrylak—the more senior of the two detailers (Patrylak and Pollastrini) who remained on strike until September 29—was allowed to return to it. Failure to have allowed him to do so, and the continuing failure to allow him to return to work as a detailer since September, is more consistent with a conclusion that, in fact, Respondent had regarded Patrylak as terminated by the time of his offer to return to work. Moreover, the fact that Respondent still made no effort after September 29 to clarify for Patrylak his continuing employment status, had that truly been the fact, is further evidence to an employee that he had been discharged when having been given his "last" paycheck. See *Elastic Shop Nut Division v. NLRB*, 921 F.2d 1275 (D.C. Cir. 1970) ("*3. Dismissal of the Striking Workers*"). At the very least, these factors left the situation no less ambiguous after September 29 than had been the situation beforehand concerning Patrylak's employment status with Respondent.

In sum, the last paycheck words were authorized by Taylor and were repeated by Sizemore to Patrylak. The natural message conveyed by those words is adios. Though aware of that conclusion by the Union and Patrylak, Respondent took no subsequent actions that would clarify for Patrylak that he had not been terminated on September 3. It never offered him the opportunity to return to the vacant detailer position. It never specifically told him that it had not terminated him. As set forth in sections I.C, F and G, supra, Respondent had unlawfully threatened to discharge, first, whomever had started the Union's campaign and, then through Koleno and Nocera, all striking employees. Of course, Patrylak fell into the latter category, having resumed striking on September 2. Even if Respondent had genuinely believed his resumed striking to have been some sort of unprotected intermittent strike, that was not the fact and, accordingly, whatever belief Respondent may have harbored to that effect does not serve to deprive Patrylak's strike activity of the Act's protection. *NLRB v. Burnup & Sims*, 379 U.S. 21, 23 (1964). Therefore, a preponderance of the credible evidence establishes that Patrylak had been discharged on September 3 for engaging in statutorily-protected strike activity in support of the Union, thereby violating Section 8(a)(3) and (1) of the Act.

In response to the conceded unconditional offers to return to work by and on behalf of all striking employees, it is alleged that Nocera had unlawfully told them that they had been fired. In fact, as set forth in section I.H., supra, credible testimony establishes that Nocera had told the striking employees, when they made those offers on September 29, that they no longer were employees of, or working for, Respondent. Regardless of the precise wording used by Nocera, the message was the same. Nocera, nor any other official of Respondent, offered any explanation for that message—one which might have supplied, even arguably, a legitimate business reason for Nocera to have said that to employees. The only reason naturally suggested to those employees was that their employment with Respondent had been severed because of their strike against it, as well as because of their support for the Union.

Whether a strike is an economic or unfair labor practice one, a statement that strikers have been separated from employment because they engaged in a strike constitutes an unfair labor practice. "Further, it is an unfair labor practice for an employer to threaten or discharge an employee for engaging in an economic strike." (Footnote omitted.) *Aero Quality Plating Co.*,

281 NLRB 138, 138 (1985). With respect to unfair labor practice strikes, "any indication to the striking employees that they could not return to work at any time they chose violates Section 8(a)(1)." *Redway Carriers*, 274 NLRB 1359, 1360 (1985). In short, a statement that strikers have been terminated for striking is an unlawful threat; so, also, is a statement that they have lost their jobs for striking. *Baddour, Inc.*, 303 NLRB 275, 275 (1991). See also *NLRB v. Sumter Plywood Corp.*, 564 F.2d 379, 380 (5th Cir. 1978).

To be sure, Respondent's witnesses denied that Nocera possessed authority to terminate employees, especially service department employees, and nothing in the record contradicts that denial. Even so, as pointed out in section I.G, supra, the allegation is not that Nocera had actually discharged the strikers offering to return to work. Rather, the allegation is that Respondent violated the Act because its admitted statutory supervisor and agent, Nocera, had said that the strikers were separated from employment with Respondent. Regardless of the exact words Nocera said, employees could fairly infer that Nocera was aware of Respondent's thinking and intentions. See, e.g., *Gray Line of the Black Hills*, supra. There is no evidence that the striking employees did not believe that Nocera had been expressing a decision made by Respondent. That is, there is no evidence that the striking employees had believed that Nocera was expressing no more than a personal opinion, unsupported by any information to which he was ordinarily privy by virtue of his supervisory and agency status with Respondent. See, e.g., *L'Eggs Products*, 236 NLRB 354, 388 (1978), enfd. in pertinent part 619 F.2d 1337 (9th Cir. 1980), and cases cited therein. Therefore, by telling striking employees that their employment had been separated with Respondent for having engaged in a strike against it, Nocera unlawfully threatened discharge of employees for having engaged in a strike, in violation of Section 8(a)(1) of the Act.

Turning to those conceded unconditional offers to return to work, as set forth in section I.G, supra, Respondent never accepted any of those offers. No striking employee was given an opportunity to return to work until the belated offer to allow driver Theodore Kalinowski to do so, shortly before the hearing in this matter was scheduled to commence. Respondent contends that by September 29, and afterward, it had no positions available for any of the striking employees—at least, not until late December when Kalinowski was offered the opportunity to return to work. But, that contention fails for three reasons.

First, as concluded in section I.G, supra, the strike had become an unfair labor practice strike by September 3 when, so far as the evidence reveals, the first replacement employee—parts driver James Arcudi—had been hired. Other replacements were hired over the course of succeeding days and months. Consequently, the strike had become an unfair labor practice strike, and the strikers unfair labor practice strikers, before any replacement employees had been hired. Unfair labor practice strikers cannot be permanently replaced. Once they make unconditional offers to return to work, their employer must allow them to return, even if that requires termination of replacements. See *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 379 fn. 5 (1967). An employer's failure to comply with that obligation violates the Act.

Second, while Respondent now argues that the employees hired in unit positions on and after September 3 had been permanent replacements, it presented no particularized evidence to support that argument. "The permanent replacement of economic strikers is a substantial and legitimate business justification for refusing to reinstate former strikers, but it is an affirmative defense, and the employer has the burden of proof." (Citation omitted.) *Target Rock Corp.*, 324 NLRB 373, 373 (1997). That burden is met by the employer's "show[ing] it had a mutual understanding with the replacements that they were permanent." *NLRB v. Augusta Bakery Corp.*, 957 F.2d 1467, 1473 (7th Cir. 1992). See also *Gibson Greetings Inc. v. NLRB*, 53 F.3d 385 (D.C. Cir. 1995). But, Respondent presented no evidence about whatever understandings it had reached with any one of the replacement employees. There simply is no evidence which would support a conclusion that any of the replacements, much less all of them, had understood that post-September 2 employment with Respondent would be permanent. Thus, regardless of whether the strike was an economic or unfair labor practice one, and regardless of whether any unit replacement employees had been hired before the strike had become an unfair labor practice strike, Respondent has failed to meet its burden of showing permanent replacement status for any of the replacement employees. So far as the record shows, those replacements were only temporary replacements and, therefore, Respondent was obliged under the Act to allow the striking employees to return to their unit positions. Failure to comply with that obligation violated the Act.

Third, the fact is that Respondent's own records—its organization chart, its census report, and its payroll records—reveal that there had been at least some vacancies in unit positions on and after September 29. There had been at least three detailer positions before the strike. Three detailers—Turk, Patrylak, and Pollastrini—had gone on strike. Turk returned the same day and Brian E. Graves was hired as a detailer on September 4. Thereafter, so far as the record discloses, no other detailer had been hired, meaning that by September 29 only two employees were working and there was one detailer vacancy. Respondent never contended that it had no work for a third detailer. In fact, it never addressed that vacancy. Yet, neither Patrylak nor Pollastrini was permitted to fill it after their September 29 unconditional offer to return to work.

Respondent's payroll records show that Kevin R. Grajewski had begun working in a unit position during the period ending September 25 and, in addition, they show that he had worked for Respondent during the periods ending October 2 and 9. Thereafter, for reason(s) never explained, his name ceases to appear on any of the remaining 1999 payroll records. Seemingly, therefore, his departure created a vacancy which, so far as the evidence shows, could have been filled by a striking employee who, by then, had made an unconditional offer to return to work. But, no one was allowed to fill the vacancy created by Grajewski's apparent departure.

Similarly, Jason A. Collin had been hired by Respondent as a porter on September 16 and he worked steadily for it during succeeding payroll periods until the one ending on December 18. His name does not appear on the following payroll record. Aside from the census report and Taylor's supporting generalized testimony that everyone of the census report remained, as of the hearing, an employee of Respondent, there is no particularized evidence that Collin had remained employed by Respondent. As discussed in section I.D, supra, in connection with Sliwa, Lounsbury, and James A. Dean, Taylor's generalized testimony, based upon the census report, about the employment of employees as of the time of the hearing, was not always reliable. Independent of his testimony, there is no reliable evidence upon which to base a conclusion that, in fact, porter Collin had remained employed by Respondent after December 18. To the contrary, it had been during that next end period—the one of December 25—that porters James A. Dean and Lounsbury suddenly reappear on Respondent's payroll, leaving some inference that, rather than allowing a striking porter to fill Collin's seemingly vacated position, Respondent had rehired Dean and Lounsbury.

True, by letter dated December 23 Respondent did offer to allow, by then, former striker Theodore Kalinowski to return to work, as a porter. Yet, by then Lounsbury and James A. Dean were working for Respondent. If one or both of them were truly students, that would mean that Kalinowski was being offered employment as a porter to replace one, perhaps both, of them because Lounsbury and Dean would be returning to school. Beyond that, no explanation was provided by Respondent concerning events leading to that offer to Kalinowski. In the circumstances, there is somewhat of an aura of tactical maneuver to the offer made to him.

Kalinowski was one of the more senior unit employees, having begun working for Respondent on August 23, 1995. He started working as a porter. By the time the strike began, however, he had been a parts driver. Thus, the offer to allow him to return to work was made for a position other than the one occupied by Kalinowski at strike's commencement. Four employees who had actually been classified as porters when the strike began—Chiarito, Ciambrone, Dove and Holicz—had sought to return to work, but had not been offered the opportunity to do so. Of course, by December Respondent had fired Chiarito. But, altogether unexplained was why Respondent had chosen to allow Kalinowski to return in a classification other than one he had occupied before the strike, while seemingly ignoring the unconditional offers to return by Ciambrone, Dove, and Holicz, each of whom had been classified as a porter before the strike started.

In sum, at least some unit positions seem to have been vacant at the time of, or became vacant after, the striking employees' unconditional offers to return to work. None of those strikers was offered the opportunity to return to work in any of those positions until the belated offer to Kalinowski, in a position other than the one he had occupied before the strike. While replacement employees were hired during the strike, none of those replacement has been shown by Respondent to have been a permanent replacement. In any event, by the time that Respondent hired the first replacement, the strike had been converted to an unfair labor practice one and, concomitantly, the strikers had become unfair labor practice strikers who could not be permanently replaced. Therefore, by failing and refusing to allow any of the strikers to return to work on and after September 30, the date alleged in the complaint, Respondent violated Section 8(a)(3) and (1) of the Act.

As to Chiarito's discharge, two lines of analysis are applicable. First, as a striker—activity protected under Sections 7 and 13 of the Act—he was entitled to be allowed to return to his job as porter follow-

ing his conceded unconditional offer to return on September 29. Failure to allow a striker to return to work—regardless of permanency of replacement workers where the strike is an unfair labor practice strike or, where an economic strike, there has been no showing that replacements were permanent ones—violates Section 8(a)(3) and (1) of the Act. See, e.g., *General Telephone Co. of Michigan*, 251 NLRB 737, 738 (1980).

On the other hand, an employer can lawfully refuse to allow a striking employee to return to work if that employer is motivated by a genuine belief that the striker has engaged in strike misconduct. *NLRB v. Fansteel Metallurgical Co.*, 306 U.S. 240, 253 (1939). Nevertheless, the Supreme Court subsequently cautioned that assertions of strike misconduct should be evaluated with care, lest "protected activity would lose some of its immunity, since the example of employees who are discharged on false charges would or might have a deterrent affect on other employees," leaving statutorily protected activity to "acquire[ ] a precarious status" because "innocent employees [are] discharged while engaging in it, even though the employer acts in good faith." *NLRB v. Burnup & Sims,* supra. Thus, the Court continued, the Act "is violated if it is shown that the [disciplined] employee was at the time engaged in protected activity, that the employer knew it was such, that the basis of the [discipline] was an alleged act of misconduct in the course of that activity, and that the employee was not, in fact, guilty of that misconduct." If the misconduct did not occur, it is not a defense that "the employer acted in good faith." That general analytical methodology is applicable to defenses of strike misconduct. See, e.g., *Beaird Industries*, 311 NLRB 768, 769 fn. 7 (1983); *Allied Industrial Workers Local 289 v. NLRB*, 476 F.2d 868, 878–880 (D.C. Cir. 1973); *Kayser-Roth Hosiery Co. v. NLRB*, 447 F.2d 396, 400 (6th Cir. 1971).

The fact is that the evidence reviewed in section I.G, *supra*, leaves scant support for Taylor's professed genuine belief that Chiarito had engaged in strike misconduct. There is no evidence that by September 30 he had known of Chiarito's September 9 arrest for violating police safety rules. Taylor professed that there had been numerous employee- and customer-complaints about supposed misconduct by Chiarito. But, despite his conceded recordkeeping concerning strike misconduct and despite ongoing photographic and videotaping surveillance, Taylor was unable to recall any specific such complaints, save for three. One, the lone employee complaint, was that of Patt: the assertions that Chiarito had threatened to kick Patt's ass.[11] Yet, as concluded in section I.G, supra, those assertions by Patt were not credibly advanced and, in consequence, there is no credible evidence that Chiarito had made such statements to Patt. In any event, such a statement is no different in effect than the similar remark attributed to Nocera on September 2, as discussed in section I.F, supra. Neither could be construed as an actual threat of physical retaliation. Therefore, there is no credible evidence that, in fact, Chiarito had made threats against Patt which constitute strike misconduct.

As to purported customer complaints, Taylor's memory again failed him and, in the end, he was able to point only to the statements by Love and Andrea Johnson. Neither one identified in their statements the "Mike" to whom they were referring. Moreover, neither of them appeared as witnesses when either or both could have pointed to Chiarito, had he truly been the "Mike" to whom each referred. Beyond that, calling someone a scab or a loser is simply not activity which constitutes strike misconduct, as pointed out in section I.E, supra. Thus, nothing in Love's statement attributes to "Mike" any activity which rises to the level of strike misconduct. Johnson's statement is rendered thoroughly unreliable in view of the credible description of Patrol Officer Siewert about the events of Saturday, September 11. Thus, a preponderance of the credible evidence fails to show that Chiarito had engaged in any conduct which constituted recognizable strike misconduct.

Taylor did not impress me as a candid witness. Certainly his generalized accounts of ongoing and numerous employee- and customer-complaints was not supported by particularized evidence. In the circumstances, where he admitted that he had been trying to keep records of the strikers' activities, and where he had photographed and videotaped those activities on an ongoing basis, his failure to be more precise is a fact which tends to support my impression that he was not a credible witness. As a consequence, I do not credit his testimony that he genuinely believed that Chiarito had engaged in strike misconduct. See, e.g., *National Steel Corp.*, 242 NLRB 294 fn. 2 (1979). To the contrary, the second line of analysis establishes that Chiarito's selection for termination had been actually motivated by Respondent's intention to be rid of the Union's leading supporter—the employee who had started the Union's campaign.

That line of analysis follows the *Wright Line* analytical methodology described in *Carlton College*, 328 NLRB 217, 219 (1999), and cases cited therein. As set forth in section I.B, supra, credible evidence shows that Chiarito had been the Union's leading proponent among Respondent's porters, detailers, parts department employees and drivers. That very fact is significant; an inference of unlawful discrimination can arise as a result of termination of a union activist, *Handicabs, Inc.*, 318 NLRB 890, 897 (1995), enfd. 95 F.3d 681 (8th Cir. 1996), cert. denied 521 U.S. (1997), and cases cited therein, especially where it is a union's leading proponent who is discharged.

As described in section I.C, supra, Respondent, through Maus, had been attempting to ascertain, through unlawful interrogation, the identity or identities of the employee(s) who had started the Union's campaign. Those interrogations had been accompanied by the bluntly-worded threat that Respondent intended to discharge whomever had done so. The unlawful photographing and videotaping discussed in section I.E, supra, is further evidence of Respondent's ongoing efforts to collect information about the employees supporting the Union. Those unfair labor practices are strong indicators of Respondent's animus toward unionization of its employees and, as well, toward the employee who had initiated the campaign to accomplish unionization of employees. See, e.g., *Carry Cos. of Illinois*, 311 NLRB 1058, 1060 (1993). Indeed, such evidence of hostility shows even more than animus: "Inference of an employer's unlawful motive [toward an employee-activist] may be drawn from the employer's hostility toward the union." *Hall v. NLRB,* 941 F.2d 684, 688 (8th Cir. 1991).

To be sure, there is no direct evidence that Respondent had learned by September 30 that Chiarito had been the Union's foremost employee-proponent. Even so, direct evidence of knowledge is no essential to establish an employer's unlawful motivation in discharging a leading union activist. "This 'knowledge' need not be established directly, however, but may rest on circumstantial evidence from which a reasonable inference of knowledge may be drawn." (Citation omitted.) *Montgomery Ward & Co.*, 316 NLRB 1248, 1253 (1995). Accord: *Alumbaugh Coal Corp. v. NLRB*, 635 F.2d 1380, 1384 (8th Cir. 1980); *Davis Supermarkets, Inc. v. NLRB*, 2 F.3d 1162, 1168 (D.C. Cir. 1993), cert. denied 511 U.S. 1003 (1994).

Respondent had been seeking to ascertain which employee or employees had started the Union. It had been photographing and videotaping the picketing activities in which Chiarito had been prominently involved. In fact, of all the picketers shown on Respondent's excerpted videotape, Taylor mentioned only the name of Chiarito when reviewing the tape during the hearing. He seemed unconcerned with any other employee, though Respondent was arguing that all of the activity shown on that videotape was improper strike activity. In fact, Respondent was quick to assume that conduct attributed to any "Mike" by a customer was conduct attributable to Chiarito. And when Koleno chose to engage in an exchange with a picketer on September 2, as described in section I.F, supra, he selected Chiarito as the picketing employee for doing so. The totality of these considerations provide ample basis for a conclusion that Respondent had figured out by September 30 that Chiarito was the Union's leading employee-proponent—the one whom Maus had threatened would be discharged. Indeed, Taylor never denied that he had concluded by September 30 that Chiarito had been the Union's foremost employee-advocate.

Consequently, the General Counsel has made a showing that antiunion animus had motivated Respondent to discharge Chiarito. As concluded above, Respondent has failed to credibly show that it had a genuine good-faith belief that Chiarito had engaged in strike misconduct sufficient to bar him from return to work. To the contrary, any "Mike" mentioned is claimed by Respondent to have been Chiarito. Patt obviously figured out that Respondent was attempting to be rid of Chiarito. For during the novel, given the absence of evidence of such meetings with other strikers desiring before September 29 to return to work, meeting conducted with him, Patt seemed to have believed that he had to scale a higher hurdle to ensure that he would be allowed to return. In an attempt to do so, he singled out Chiarito as the striking employee who had made assertedly improper statements. Then, Respondent immediately did allow Patt to return to work. Given the totality of the evidence, I do not credit Taylor's testimony that nothing more than perceived strike misconduct by Chiarito had motivated the decision to fire Chiarito.

[11] Of course, it was not until Patt testified that he abruptly added the supposed car-following incident. Obviously, Taylor could not have known of that addition by September 30; no one knew about it until Patt supplied it during the hearing.

Two consequences follow from that conclusion. First, by advancing false reasons for Chiarito's discharge, Respondent failed to satisfy its burden of going forward with a credible legitimate reason for Chiarito's termination. Second, by advancing false reasons, Respondent was attempting to conceal the true reason for discharging Chiarito. *Painting Co.*, 330 NLRB 100, 1001 (2000). Given the absence of any possible concealed reason unrelated to Chiarito's union activities, it is a fair inference that the actual reason being concealed was Chiarito's role as leading employee-activist on behalf of the Union—the employee who had started its campaign. Therefore, in light of the totality of the considerations enumerated in this and in preceding paragraphs, I conclude that a preponderance of the credible evidence establishes that Respondent's discharge of Chiarito had violated Sections 8(a)(3) and (1) of the Act.

That leaves for resolution Respondent's unwillingness to recognize the Union on and after August 30 and the related question of the propriety of a bargaining order remedy. As set out in sections I.B and I.D, supra, by August 30 the Union had possessed authorization cards signed by a majority of the employees in the stipulated appropriate bargaining unit and, further, had requested that Respondent recognize it as the exclusive collective-bargaining representative. To be sure, the unit in which the Union requested recognition differs in nomenclature from the unit which the parties stipulated to be appropriate. But, that difference in nomenclature does not, in the circumstance presented here, detract from the validity of the Union's recognition request.

Taylor never claimed that he had been confused by the nomenclature used in August with reference to the unit in which the Union was seeking recognition. Thus, to conclude that the nomenclature difference is a defense to the alleged refusal to bargain allegation, would be to construct a defense for Respondent which it has not advanced, much less supported with any testimony. That is not allowed. See, e.g., *Norris/O'Bannon*, 307 NLRB 1236, 1242 (1992), and cases cited therein. "The employer alone is responsible for its conduct and it alone bears the burden of explaining the motivation for its actions." *Inland Steel Co.*, 257 NLRB 65, 68 (1981).

Beyond that, there is no evidence that Respondent took any action to clarify the unit in which the Union had been seeking representation as the bargaining agent. The strike commenced immediately after Respondent refused to recognize the Union. Porters, detailers, parts department employees and drivers engaged in that strike. So, it had to be obvious to Taylor that those were employees whom the Union was seeking to represent. True, no hikers participated in the strike, so far as the record discloses. Yet, there is no evidence that Respondent had been confused about the status of hikers, as employees whom the Union was seeking to represent, and, moreover, no evidence that Respondent made any effort to ascertain whether or not hikers were among the employees whom the Union was seeking to represent. In sum, disparity in unit nomenclature is not a defense which was presented and is not one upon which any resolution can now be supplied for Respondent.

Neither on August 30 nor on any other date did Respondent ever assert that its unwillingness to recognize the Union had been based upon a doubt of the Union's majority status. When testifying, Taylor never claimed that he had doubted the Union's status as the representative of a majority of employees in the stipulated appropriate bargaining unit. Indeed, that would have been difficult to do, given that 11 of the card signers and detailer Turk went out on strike on August 30. As concluded in section I.D, supra, that constituted a majority of the employees whom the Union was seeking to represent. If nothing else, it demonstrated to Respondent that, in fact, a majority of the unit employees did support the Union's request for recognition.

Rather that recognize the Union—or, even, rather than question its majority status—Respondent had already embarked upon its own campaign, to undermine support for the Union, by August 30—apparently to "so extinguish seeds [that] it would have no need to uproot sprouts." *Ethan Allan, Inc. v. NLRB*, 513 F.2d 706, 708 (1st Cir. 1975). Maus had already begun questioning employees in an effort to ascertain the identity or identities of the employee(s) who had started the Union's campaign. He made no bones about the purpose of his questioning: if identified, that employee or those employees were going to be fired. True, Maus did not possess authority to terminate employees without Taylor's authorization to do so. Still, evaluating his threat from employees' perspective, Maus was their service manager and they could fairly conclude that whatever he was saying reflected the thinking of Taylor. For, there is no evidence that Maus had been prone to making statements to employees about employment terms and conditions, when such statements had not been authorized by Taylor—that Maus had been some sort of loose cannon in making such remarks to employees. In fact, as concluded in section I.C, supra, Taylor had unlawfully told all unit employees present during the morning of August 30 that he was ceasing further consideration of benefits changes because he had learned about the Union's campaign—a remark unlawful itself and, further, a remark which tends to reinforce Maus's threat by demonstrating to all unit employees Respondent's willingness to retaliate against employees because of the Union's campaign.

Following its rejection of the Union's recognition request, Respondent engaged in ongoing unlawful surveillance of strike, through the photographing and videotaping discussed in section I.E, supra. As described in section I.F, supra, its apparent agent Koleno unlawfully threatened striking employees with eventual discharge and, the next day, Taylor's designated agent Sizemore repeated a threat of discharge to Patrylak, as described in section I.G, supra. Only Sizemore's threat was not of eventual discharge, but of actual discharge for no reason other than having returned to the strike and Respondent actually did fire Patrylak for that reason, as concluded above. When the striking employees made unconditional offers to return to work, Nocera flatly told them that their employment with Respondent had been severed. Indeed, despite those offers, not one of the strikers was allowed to return to work until, shortly before the hearing was scheduled to commence, one parts driver was offered the chance to return to work, but only as a porter. As concluded above, Respondent violated Section 8(a)(3) and (1) of the Act by failing and refusing to offer all of the strikers the opportunity to return to work on and after September 30.

The foregoing events provide ample support for a conclusion that, rather than doubting the Union's majority status in the stipulated appropriate bargaining unit, Respondent had been refusing to recognize it in an effort to undermine the Union's support among unit employees, an effort that seemingly proved successful with respect to Patt. Therefore, I conclude that by failing and refusing to recognize the Union, Respondent violated Section 8(a)(5) and (1) of the Act. Even absent that conclusion, however, a bargaining order is warranted as a remedy for the serious unfair labor practices committed by Respondent. For its unlawful conduct was of such magnitude that it cannot be concluded that its effects can be fully remedied by standard Board remedies and that a fair representation election could be conducted in the future free of the lingering impact of those unfair labor practices.

Threats to discharge employees who are union activists and supporters are regarded as "hallmark" violations of the Act. See, e.g., *Climatrol, Inc.*, 329 NLRB 946 (1999); *Douglas Foods Corp.*, 330 NLRB 821 (2000). No less severe and, thus, no less a "hallmark" violation is an employer's unlawful threats of unwillingness to allow strikers to return to work, following those strikers' unconditional offers to do so. Here, also, Respondent discharged leading union adocate Chiarito and, in addition, discharged Patrylak for returning to the strike. Moreover, not one of the striking employees was allowed to return to work until one was offered the opportunity to do so almost 3 months after all of the striking employees had made unconditional offers to return to work.

The discharges and refusals to allow strikers to return to work were not the only unfair labor practices committed by Respondent. Other serious unfair labor practices were committed by it: a statement that benefits improvements were no longer being considered because of emergence of the Union's campaign, and ongoing wide-ranging surveillance of employees' strike activities. Most of the unfair labor practices in this and in the preceding paragraph became known to all striking employees, and in all likelihood to unit employees who were not striking. For example, all of the unit employees, strikers and nonstrikers, were aware of Taylor's August 30 unlawful statement. The photographing and videotaping were obvious to everyone at Respondent. The refusals to allow strikers to return to work had to be obvious to everyone working at Respondent. In sum, not only were the unfair labor practices serious in nature, but many, perhaps all, of those serious unfair labor practices were known to all striking and nonstriking unit employees. In short, the effects of Respondent's unfair labor practices were pervasive.

Furthermore, the effects of those unfair labor practices would naturally linger to such an extent that, despite compliance with normal Board remedies, they would prevent a fair and free representation election from being conducted in the foreseeable future. Respondent's "hallmark" violations—its discharges of Patrylak and Chiarito, its refusal, for almost 3 months, to allow any of the striking employees to return to work, the threats to discharge the employee(s) who started the Union's campaign and, then, those employees who were on strike—sent employees "the unequivocal message that it was willing to go to extraordinary lengths in order

to extinguish the union organizational effort," and "such a severe message will have a lasting effect on the unit employees' exercise of their right to organize." *Consec Security*, 325 NLRB 453, 454 (1998). In fact, any "restorative effect that Board-ordered reinstatement may have on unit employees is severely diminished by that fact that . . . [i]t is highly improbable that the employees who [did not strike and who returned before the afternoon of September 29] and the discriminatees who are entitled to reinstatement will risk further retaliation by supporting the [U]nion." *Climatrol, Inc.,* supra.

The August 29 announcement that all consideration of benefits improvements had ceased because of the Union's campaign, and authorization for the ongoing, wide-ranging photographing and videotaping were made by Taylor, Respondent's highest-ranking official at the Orland Park facility. So, too, the decision not to allow strikers to immediately return to work and the decision to fire Chiarito, as well as the earlier decision to terminate Patrylak, were ones made by Taylor. He remains Respondent's vice president and general manager. Both Nocera and Maus also remain in the positions which they had occupied during August and September. There is no evidence that any of them remain less disposed to engage in unfair labor practices—nor, in Taylor's case, to direct that unfair labor practices be committed—than had been the fact in August and September. To the contrary, as of the hearing Chiarito remained discharged and all of the strikers, save Kalinowski, were left without any offers to allow them to return to their jobs at Respondent. In sum, so far as the evidence discloses, those officials continue to appear "deeply committed to [Respondent's] antiunion position, a commitment from which it is not likely to retreat." *State Materials, Inc.*, 328 NLRB 1317 (1999).

In light of the totality of the foregoing considerations, I conclude that a remedial bargaining order is the only adequate means for effectively assuring that unit employees' wishes for representation, as reflected by the authorization cards signed by a majority of them, will be given effect. Inasmuch as Respondent began its unlawful antiunion effort on the day after the Georgio's meeting, "Respondent's obligation to recognize and bargain with the Union began on" August 25. *Climatrol, Inc.,* supra at 4.

CONCLUSIONS OF LAW

Orland Park Motor Cars, Inc., d/b/a Mercedes Benz of Orland Park has committed unfair labor practices affecting commerce by interrogating employees about Union activities, threatening to discharge employees who started a union's campaign, threatening employees with discharge for having gone on strike and telling employees that they had been discharged for going on strike, telling employees that consideration of benefits improvements had ceased because of a Union's organizing campaign, and engaging in surveillance of employee union activities, in violation of Section 8(a)(1) of the Act; by discharging Brad Patrylak and Michael Chiarito and failing to allow striking employees to return to work following their unconditional offers to return to work, in violation of Section 8(a)(3) and (1) of the Act; and, by refusing to recognize and bargain with International Brotherhood of Teamsters, Local No. 731, AFL–CIO as the exclusive collective-bargaining representative of all employees in an appropriate bargaining unit of all full-time and regular part-time porters, detailers, hikers, parts department employees and drivers employed by Orland Park Motor Cars, Inc., d/b/a Mercedes Benz of Orland Park at its facility currently located at 8430 West 159th Street, Orland Park, Illinois; excluding all sales persons, mechanics, technicians, office clerical employees, service writers, dispatchers, professional employees, guards and supervisors as defined in the Act, in violation of Section 8(a)(5) and (1) of the Act.

REMEDY

Having concluded that Orland Park Motor Cars, Inc., d/b/a Mercedes Benz of Orland Park has engaged in unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and, further, that it be ordered to take certain affirmative action to effectuate the policies of the Act. With respect to the latter, it shall be ordered to, within 14 days from the date of this Order, offer full reinstatement to Brad Patrylak, to Michael Chiarito, and to all striking employees who offered unconditionally to return to work on September 29, 1999, to the positions which each of them had occupied prior to the strike which began on August 30, 1999, dismissing, if necessary, anyone who may have been hired or assigned to perform the job of detailer after the unlawful discharge of Patrylak on September 3, 1999, anyone who may have been hired or assigned to perform the job of detailer after the unlawful discharge of Chiarito on September 30, 1999, and anyone who may be working in the strikers' jobs on and after September 29, 1999. If one or more of those jobs no longer exists, employment will be offered in a substantially equivalent position or positions, without prejudice to seniority or other rights and privileges which would have been enjoyed but for the unlawful discharges and unlawful failures to promptly allow all strikers to return to work.

Moreover, it shall make all of those employees whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, with backpay to be computed on a quarterly basis, making deductions for interim earnings, *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and with interest to be paid on amounts owing, as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). It shall also, within 14 days from the date of this Order, remove from its files any reference to the discharges of Patrylak and Chiarito and any reference to the unlawful refusal to allow strikers to return to work following their unconditional offers to do so, and within 3 days thereafter shall notify each of those employees in writing that this has been done and that the discharges and refusals to allow strikers to return to work shall not be used against them in any way.

Furthermore, it shall be ordered, effective August 25, 1999, to recognize and, upon request, bargain with International Brotherhood of Teamsters, Local No. 731, AFL–CIO as the exclusive collective-bargaining representative of all employees in an appropriate bargaining unit of all full-time and regular part-time porters, detailers, hikers, parts department employees, and drivers employed by Orland Park Motor Cars, Inc., d/b/a Mercedes Benz of Orland Park at its facility currently located at 8430 West 159th Street, Orland Park, Illinois; excluding all sales persons, mechanics, technicians, office clerical employees, service writers, dispatchers, professional employees, guards and supervisors as defined in the Act.

[Recommended Order omitted from publication.]